

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES CAMARENA HERNANDEZ,

Defendant and Appellant.

D059514

(Super. Ct. No. SCN282325)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed in part; reversed in part with directions.

A jury convicted Andres Camarena Hernandez of indecent exposure (Pen. Code,¹ § 314, subd. (1), count 2) and lewd conduct (§ 647 subd. (a), count 3). It found Hernandez not guilty of assault with a deadly weapon or force likely to cause great bodily injury as alleged in count 1 under section 245, subdivision (a)(1) and not guilty of the lesser included offense of simple assault under section 240. The court sentenced

¹ All statutory references are to the Penal Code unless otherwise stated.

Hernandez to the maximum sentence of 180 days on count 2 and stayed the sentence on count 3 under section 654. It denied probation, credited Hernandez 271 days for time served, and ordered him released from custody. The court also ordered Hernandez to register as a sex offender and attend "AIDS education to be completed in state prison."

Having reviewed the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436, we find one meritorious appellate issue, namely, sentencing error in the trial court's order requiring Hernandez to attend AIDS education in state prison. Accordingly, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

On September 12, 2010, in the late afternoon, Jasmine R. and her cousin Alexis Z. were walking down Massachusetts Avenue in Vista, California when they stopped to talk to Alexis's friend, Judy, who lived in the neighborhood. Shortly after Judy walked away, a white truck pulled up to the sidewalk where Jasmine and Alexis were standing, and the male driver, who Jasmine later identified as Hernandez, asked for directions to Nevada Street through the passenger window. Jasmine saw "a bunch of moving around" in Hernandez's lap, and she moved slightly to the left so she could see inside the truck without him noticing. His pants were unzipped, and she could "clearly" see his erect penis. Jasmine "confirmed [her] suspicion" that Hernandez was masturbating: "He was going up and down on his penis . . . [¶] . . . [I]t was pretty fast."

Meanwhile, Alexis knew where Nevada Street was, and she tried to give Hernandez directions. Alexis did not see his penis, but she saw his right hand moving up and down. Jasmine told Alexis to keep talking to him, then Jasmine walked behind the

truck and took a picture of the license plate using the camera on her cell phone.

Hernandez saw Jasmine through the rear view mirror and drove away quickly.²

Jasmine and Alexis then went to Judy's house, and Judy's mother called 911. During the call, Jasmine gave the dispatcher a physical description of the driver. San Diego Sheriff's Department Deputy Michael Hanks responded to the 911 call and interviewed Jasmine, Alexis, and Judy. Deputy Hanks looked at the image on Jasmine's phone and gave the license plate number to other deputies in the area. Sheriff's Department Detective Dave Brannan investigated the case and determined that Hernandez was the registered owner of the white truck.

During the lunch recess on the first day of trial, the court learned that a local news station had posted an article on its website about the case. The article said Hernandez got out of prison and committed or allegedly committed the charged crimes the next day. The article also described the crimes and included Hernandez's picture. The trial court observed that voir dire was not conducted on the issue because no one had anticipated media coverage of the case. It discussed the matter with counsel, then asked the jurors if any of them had read the article or seen any publicity about the case. All jurors denied seeing any publicity. The court admonished the jury to not watch or read any news stories about the case and reminded the jury that news stories are not evidence. At the end of the first day of trial, the court again reminded the jurors to not read or listen to any publicity.

² Because the jury acquitted Hernandez on count 1, we need not discuss the facts related to the alleged assault.

On the morning of second day of trial, the court again discussed the publicity issue with counsel. The court learned that between the end of the first day of trial and that morning, two local television stations ran news tickers referencing the case. One news website published an article stating the trial had started, and it included Hernandez's name and picture. Before resuming the trial, the court asked: "Did the jury have any issue or problem with any issues relating to media that you should disclose to us? If so, raise your hand." No jurors raised their hands.

At sentencing, the court ordered Hernandez, whose custody credits exceeded his 180-day sentence, be released from custody. The court further ordered Hernandez to register as a sex offender³ and also complete AIDS education:

"The Court: I don't remember if that's—if there's a required AIDS education on that.

"[Defense Counsel]: I don't remember either.

"The Court: But I'm going to order it. And you can take care of that while he's in custody 'cause I'm sure the prison people are going to keep him in custody for a while to figure out what to do.

"[Defense Counsel]: Your Honor, can I request that it be concurrent with parole?

"The Court: I choose not to make it concurrent with parole. It's—however it will be up to parole to make that decision.

"[Defense Counsel]: Okay.

³ The trial court observed Hernandez had previously been ordered to register as a sex offender in other cases.

"The Court: The last sentencing entity gets to make that call."

The minute order states that the "court orders AIDS education to be completed in state prison."

DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende, supra*, 25 Cal.3d 436. Under *Anders v. California* (1967) 386 U.S. 738, counsel identifies two possible, but not arguable, appellate issues: (1) whether there is sufficient evidence to support Hernandez's conviction for disorderly conduct as alleged in count 3; and (2) whether the media coverage surrounding the case denied Hernandez a fair trial.

This court invited Hernandez to file a supplemental brief on his own behalf, but he did not respond.

I. *Sufficiency of the Evidence*

When reviewing the sufficiency of the evidence on appeal, we must determine whether substantial evidence supports the conclusion of the trier of fact. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We review "the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) We must give due deference to the trier of fact and may not substitute our evaluation of a witness's credibility for that of the fact finder. (*People v. Jones* (1990) 51 Cal.3d 294,

314.) Moreover, the "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable."
(*People v. Scott* (1978) 21 Cal.3d 284, 296.)

We conclude substantial evidence supports Hernandez's conviction under section 647, subdivision (a) as alleged in count 3. Under this section, any person "[w]ho solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view" is guilty of disorderly conduct, a misdemeanor. (§ 647, subd. (a).) The statute serves the primary purpose of protecting onlookers who may be offended by the proscribed conduct. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 255.) "The terms 'lewd' and 'dissolute' in this section are synonymous, and refer to conduct which involves the touching of the genitals . . . for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct." (*Id.* at p. 256.) Masturbation in public is lewd and dissolute (see *People v. Chambless* (1999) 74 Cal.App.4th 773, 784-785), and a person sitting in an automobile upon a public street is in a public place. (*People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 40 [discussing § 647, subds. (b) and (f)], citing *People v. Kelley* (1969) 3 Cal.App.3d 146, 150 & fn. 2; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [discussing § 647, subd. (f), "one sitting in an automobile upon the street is in a public place as contemplated by the statute"].)

Here, both Jasmine and Alexis identified Hernandez as the driver who pulled up to the sidewalk where they were standing and asked for directions. While sitting in his

truck upon the public street, Hernandez was in a public place. Jasmine testified she clearly viewed Hernandez's penis and saw him masturbating, and Alexis testified she saw his right hand moving up and down. The testimony provided by the two witnesses is neither physically impossible nor inherently improbable and thus constitutes substantial evidence to support his lewd conduct conviction.

II. *Media Coverage*

The media coverage surrounding the case did not deny Hernandez a fair trial. The constitutional right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial and indifferent jurors. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) The denial of a fair hearing violates even the minimal standards of due process. (*Ibid.*) "When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877.) "But 'pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" (*Skilling v. U.S.* (2010) 561 U.S. ____ [130 S.Ct. 2896, 2916].)

In *Powell v. Superior Court* (1991) 232 Cal.App.3d 785 at pages 789-790 (*Powell*), the court ordered a change of venue because there was a reasonable likelihood that a fair and impartial trial could not be held in Los Angeles County. Four police officers faced multiple charges arising from their conduct during the apprehension and arrest of a suspect, and a local television station had broadcast a video of the incident. (*Id.* at p. 789.) Questions developed about the integrity of the police department, and the

mayor called for the chief of police to resign. (*Ibid.*) The incident received extensive and pervasive media coverage, but it was the high level of political turmoil and controversy generated by the incident that compelled the court to conclude the defendants could not receive a fair trial in the county. (*Id.* at p. 790.) The court stated that "were this simply a matter of extraordinary publicity [it] might have reached a different conclusion." (*Ibid.*)

Here, unlike *Powell*, the incident did not receive extensive and pervasive media coverage that resulted in political turmoil and controversy. Indeed, we cannot say based on the record that Hernandez's case even had anything close to "extraordinary publicity." Although voir dire was not conducted on the issue, no juror indicated he or she had seen any publicity about the case when the court learned of the online article during the first day of trial. The court admonished the jury to not watch or read any news stories about the case, and on the second day of the trial, no jurors had "any issues relating to media" coverage. We conclude the media coverage did not deny Hernandez a fair trial by an impartial jury.

III. *Unauthorized Sentence*

The concept of "unauthorized sentence" constitutes a narrow exception to the general requirement that only claims properly raised and preserved by the parties are reviewable on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Generally, a sentence is unauthorized if it could not be imposed lawfully under any circumstance in the particular case. (*Ibid.*)

We note that at sentencing, the court ordered Hernandez to complete AIDS education while in state prison. Under section 1001.10, a judge shall require any person

who has violated section 647, subdivision (a) to agree to participate in an AIDS education program as a condition of either placing the person on probation or of permitting the person to participate in a drug diversion program. Subdivision (b) of that section provides: "This section shall apply to any person who has either been placed on probation or granted diversion for . . . [a] violation of subdivision (a) . . . of Section 647."

This order is unauthorized for two reasons. First, Hernandez was neither placed on probation nor is he participating in a drug diversion program. Therefore, Hernandez does not qualify under the statute. Second, the court lacks authority to require Hernandez to complete AIDS education in state prison after ordering him released from custody for time served. Accordingly, we strike that portion of the judgment ordering Hernandez to complete AIDS education.

Our review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738, including the possible issues referred to by Hernandez and his appellate counsel, has revealed no other arguable appellate issue. Competent counsel has represented Hernandez on this appeal.

DISPOSITION

The judgment is reversed as to the order requiring Hernandez to complete AIDS education and we direct the trial court to modify the judgment by striking that requirement. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

IRION, J.