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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN SIENUS EKKELKAMP,

Defendant and Appellant.

E060127

(Super.Ct.No. SWF1301525)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed.

Lewis A. Wenzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Terreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Marvin Sienus Ekkelkamp of two counts of resisting arrest (Pen. Code, § 148, subd. (a)), two counts of failing to obey restraining orders (Pen. Code, § 166, subd. (a)(4)), criminal trespass (Pen. Code, § 602, subd. (d)), felony indecent exposure (Pen. Code, § 314, subd. (1)), and felony display of a false license plate (Veh. Code, § 4463, subd. (a)(1)). In addition, the trial court found defendant guilty of displaying a license plate issued to a vehicle other than the one on which it was displayed (Veh. Code, § 4462, subd. (b)), which had been charged as an infraction. The trial court then conducted a bifurcated proceeding in which it found defendant had two prior convictions that qualified as strikes.

At sentencing, the trial court struck the prior strikes and placed defendant on probation for three years. However, defendant was later sentenced to state prison after violating terms of his probation.

On appeal, defendant contends insufficient evidence supports the conviction for felony indecent exposure. (Pen. Code, § 314, subd. (1).) Defendant also challenges the conviction for display of a false license plate (Veh. Code, § 4463, subd. (a)(1)) by arguing either that the jury received inadequate instructions or that his conduct does not constitute forging a license plate as a matter of law. As we explain *post*, we disagree and affirm the judgment.

FACTUAL BACKGROUND

Defendant only challenges his felony convictions for indecent exposure (Pen. Code, § 314, subd. (a)) and fraudulent display of a false license plate (Veh. Code, § 4463, subd. (a)(1)). Accordingly, we summarize only the evidence supporting these counts.

A. Fraudulent Display of a False License Plate

On November 29, 2012, a deputy sheriff responded to a report of a possible drunk driver. She located defendant in a Ford Explorer bearing an Oregon license plate. A dispatcher indicated the plate was registered to a Chrysler. The Ford Explorer had not been registered in California since 2003. After the deputy asked defendant to exit the vehicle and indicated the license plate was not registered to the Ford Explorer, defendant said, “I know it’s a ‘91 Chrysler convertible.” The deputy then tried to arrest defendant, but he refused to get into the patrol car and started yelling obscenities. Another deputy arrived to assist, and defendant was informed he was under arrest because the license plates did not match the Ford Explorer. Defendant responded: “I know all about the damn thing. Every fucking cop knows about it.” These events led to defendant’s conviction for misdemeanor displaying an incorrect license plate. (Veh. Code, § 4462, subd. (b).)

More than six months later, on June 6, 2013, Jared Hansen, another deputy sheriff, stopped defendant’s vehicle after watching it fail to stop at a stop sign. At the time, defendant was wearing “some leopard print bikini style underwear and a long tank top shirt that halfway covered it.” Defendant had no registration or insurance for the vehicle

he was driving. The Oregon license plates on the Ford Explorer were registered to a Chrysler. The Ford Explorer had last been registered in California in 2003, and at that time it had been registered to someone other than defendant. Defendant told Deputy Hansen that he owned the license plates and could place them on any vehicle he chose.

Based on his training and experience, Deputy Hansen testified at trial that defendant intended to commit fraud by placing the license plates registered to the Chrysler on the Ford Explorer. He said the process of “tak[ing] a license plate that has no issues and put[ting] it on a vehicle that may have issues” was known as “cold plating.” When deciding whether a driver who has cold plated a vehicle possesses fraudulent intent, Deputy Hansen considers “the circumstances of the person, of the vehicle, past history, and come[s] to a conclusion based on the totality of the circumstances of everything that’s going on that . . . the person is intending to defraud the state or intending to misrepresent the vehicle for one reason or another.” The existence of a previous similar violation is relevant to this inquiry, and the length of time the violation has continued is “a big factor.” Because dispatch mentioned defendant’s earlier citation for having the Oregon plates on the Ford Explorer, Deputy Hansen knew defendant was aware of the need to register the vehicle. In addition, Deputy Hansen testified that, because defendant had not registered the Ford Explorer in California, no registration fees had been paid on that vehicle for over nine years. Deputy Hansen also testified that properly registering a vehicle in California means complying with some of the nation’s “most stringent” smog and air quality regulations.

B. Indecent Exposure

On June 30, 2012, defendant was arrested for being nude in public. The officer who responded to the scene spoke to defendant, who admitted being nude on his property “every day.” Defendant also told the officer, “That he can be nude and no one can tell him that he can’t and he would be nude 365 days a year.” In the prosecution that followed the 2012 arrest, defendant was convicted of violating section 314. During that proceeding, and in defendant’s presence, a neighbor testified that he was bothered by defendant’s nudity. As part of the prior prosecution, the trial court ordered defendant to wear clothing “which fully covers his buttocks and genitals when outside.”

On May 12, 2013, a deputy sheriff responded to a complaint that defendant was still appearing nude in public. One of defendant’s neighbors showed the deputy photos of defendant that she had taken with her camera on that day. When the deputy approached the fence dividing the neighbor’s property from defendant’s property, the deputy could see over the fence. He was able to view defendant sweeping while wearing nothing but sandals.

At trial in this prosecution, the neighbor who made the complaint to the police testified she had seen defendant naked through her kitchen window on the day she took the photos. She had also seen defendant naked on previous occasions. Seeing defendant unclothed made the neighbor “very upset”; more specifically, she found defendant’s nudity “sexually offensive.” The neighbor expressed concern about her children’s exposure to nudity and testified they had made comments about seeing defendant without

clothing. At the time of trial, the neighbor's two daughters were two and five years old. The neighbor testified defendant was aware that his nudity offended her, because she had told him to put clothes on in the past.

Other neighbors also testified to seeing defendant nude on his property, but also on their property, as well. The neighbor who testified in defendant's presence at the previous trial "couldn't tell . . . how many times" he had seen defendant nude and said he "couldn't count that high probably." This neighbor further stated, "It's not right that my 5-year-old and 2-year-old granddaughters get to see him running around nude." When this neighbor would ask defendant to put clothes on, defendant responded, "It's hot out." Another neighbor also testified she had seen defendant nude and yelled at him to put clothing on. Nonetheless, his nudity remained "an ongoing thing." Yet another neighbor had seen defendant completely nude an "uncountable" number of times. Her three children had been upset by defendant's nudity, which the neighbor found sexually offensive. Still another neighbor testified defendant was "always outside the barrier [enclosing defendant's yard] naked." He then recounted an incident in which he and a friend heard some noises from defendant's property, looked over the fence to see if he was okay, and saw defendant masturbating.

RELEVANT PROCEDURAL HISTORY

In the amended information on which they proceeded to trial, the People alleged defendant had "willfully, unlawfully, and with the intent to defraud, prejudice and damage, alter[ed], forge[d], counterfeit[ed], and falsif[ied] a LICENSE PLATE . . . with

the intent to represent the same as issued by the Motor Vehicles Department, state of California.” When the trial court began discussing the jury instruction for this count, the prosecutor indicated her theory was that defendant had falsified a license plate with the intent to represent it as issued by the Department of Motor Vehicles because he had placed an Oregon license plate registered to a Chrysler on a Ford Explorer that had not been registered in California for many years. The trial court rejected this theory because defendant cannot have represented a license plate from Oregon as one that had been issued by the California Department of Motor Vehicles.

The trial court then located language about license plates “provided by a foreign jurisdiction” in subdivision (1) of Vehicle Code section 4463. This caused the prosecutor to express an intention to “put the foreign district language in.” The trial court’s response was, “I think so, but it might take more.” After requesting time to review the statute, the trial court eventually concluded that the People could argue defendant had violated Vehicle Code section 4463, subdivision (a), by proving he had displayed a “false” license plate with fraudulent intent. The prosecutor agreed to requote the jury instruction as she and the court had discussed. Defendant assisted by locating language defining the fraudulent intent the People were required to prove.

In the end, the trial court gave CALCRIM 1904 after it had been modified as instructed by the trial court. The instruction read, in relevant part:

“To prove that the defendant is guilty of this crime, the People must prove that:
“1) The defendant falsely displayed a license plate from a foreign jurisdiction,

“AND

“2) When the defendant did that act, he intended to defraud.

“Someone intends to defraud if he intends to deceive another person either to cause a loss of money, goods, or services, or something else of value, or to cause damage to a legal, financial, or property right.

“For the purposes of this instruction, a person includes a governmental agency, . . .

“It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.”

In her closing argument, the prosecutor repeated that the jury needed to find defendant had “falsely displayed a license plate from a foreign jurisdiction with the intent to defraud” in order to be convicted of a felony violation of Vehicle Code section 4463, subdivision (a)(1). She then said, “And, obviously, the license plate from Oregon is from a foreign jurisdiction. It doesn’t go with the Ford.” Next, the prosecutor reminded the jury that no one needed to have actually been defrauded but contended the California Department of Motor Vehicles had actually suffered a monetary loss because defendant had not paid fees to register the Ford Explorer bearing the Oregon license plate. In his closing argument, defendant, who represented himself, discussed only the count for indecent exposure.

DISCUSSION

Defendant argues he has been punished for an act that is not criminal because his placing a genuine Oregon license plate registered to a Chrysler on a Ford Explorer last

registered in California cannot violate Vehicle Code section 4463, subdivision (a), as a matter of law. He also contends he cannot be convicted of a felony under that statute for cold plating a vehicle because Vehicle Code sections 4462 and 4462.5 are more specific statutes making it a misdemeanor to display a license plate not registered to the vehicle on which the plate is placed “with intent to avoid compliance with vehicle registration requirements.” (Veh. Code, § 4462.5.) Because the jury was instructed that he could be convicted of a felony under Vehicle Code section 4463 for “falsely display[ing] a license plate from a foreign jurisdiction,” defendant asserts the instruction was improper. With respect to the indecent exposure conviction (Pen. Code, § 314, subd. (1)), defendant argues insufficient evidence supports the verdict because the People failed to prove his nudity was “lewd” conduct.

A. No Error Occurred With Respect to the Conviction for Fraudulent Display of a False License Plate (Veh. Code, § 4463, Subd. (a)(1))

Vehicle Code section 4463, subdivision (a)(1), is a complicated statute containing several clauses in the disjunctive. As relevant to these proceedings, it makes it a felony to, “with fraudulent intent display[] . . . or have in [one’s] possession a . . . false . . . license plate”

1. The People did not need to prove defendant had actually forged the Oregon license plate

We employ de novo review when construing statutes. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) In the course of our inquiry, we “are required to give

meaning to every word of a statute if possible and should avoid a construction that makes any word surplusage. [Citation.] We give the statutory language its usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. [Citation.] If the plain language of the statute is unambiguous and does not involve an absurdity, then the plain meaning governs. [Citation.] Every word and phrase is presumed to be intended to have meaning and perform a useful function. [Citation.] A construction rendering some words in the statute useless or redundant is to be avoided.” (*People v. Johnson* (2012) 211 Cal.App.4th 252, 259 [Fourth Dist., Div. Two].)

Defendant’s argument that Vehicle Code section 4463, subdivision (a)(1), requires proof that he somehow altered the Oregon license plate he placed on the Ford Explorer fails. Although other clauses within this statutory provision require an act of forgery or alteration, the final clause does not. Instead, it makes it a felony to display or possess a license plate that is “false.” (Veh. Code, § 4463, subd. (a)(1).) In common parlance, “false” means, among other things, “deceiving or meant to deceive,” “misleading,” and “not real.” (Webster’s New World Dict. of the American Language (2d coll. Ed. 1984) p. 504, col. 1.)

In this case, it is undisputed that defendant placed a license plate registered to a Chrysler in Oregon on a Ford Explorer he drove in California. In fact, defendant himself told the officer who arrested him for violating Vehicle Code section 4462 on November 29, 2012, that he and “[e]very fucking cop” knew “all about the damn thing.” When

defendant was arrested some months later for violating Vehicle Code section 4463, subdivision (a)(1), he told Deputy Hansen he could put the Oregon license plate on any car he chose. Defendant essentially admitted to displaying a license plate that was “false” in the sense that it did not belong on the Ford Explorer. On appeal, defendant presents no reason why the word “false” does not encompass this conduct.

Instead, defendant relies on the portion of the statute that refers to license plates issued by foreign jurisdictions. That provision criminalizes the actions of anyone who “[a]lters, forges, counterfeits, or falsifies a certificate of ownership, registration card, certificate, license, license plate, device issued pursuant to Section 4853, special plate, or permit provided for by this code or a comparable certificate of ownership, registration card, certificate, license, license plate, device comparable to that issued pursuant to Section 4853, special plate, or permit provided for by a foreign jurisdiction.” (Veh. Code, § 4463, subd. (a)(1).) The portion of the statute on which the trial court and the People relied contains no requirement of altering, forging, or the like. As explained *ante*, it renders felonious the simple display or possession of a license plate that is false. Defendant himself admitted he committed this act. There is therefore no basis for his contention that he was punished for conduct that is not criminal.

Defendant further supports his interpretation of Vehicle Code section 4463, subdivision (a)(1), by invoking the rule of lenity, which states that, “If a statute defining a crime or punishment is susceptible of two reasonable interpretations, we ordinarily adopt the interpretation that is more favorable to the defendant.” (*People v. Arias* (2008) 45

Cal.4th 169, 177.) We fail to see why Vehicle Code section 463, subdivision (a)(1), is susceptible of multiple interpretations that are reasonable. As we explained *ante*, that provision makes it a felony to display a license plate that is “false.” (Veh. Code, § 4463, subd. (a)(1).) The rule of lenity “applies ‘ “only if the court can do no more than guess what the legislative body intended.” ’ [Citation.]” (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) Our interpretation is supported both by the language of the relevant statute and the commonly understood meaning of the word “false.” We have therefore done more than simply guessing at the meaning of Vehicle Code section 4463, subdivision (a)(1).)

2. *The jury instruction governing the count for fraudulent display of a false license plate was proper*

Defendant asserts the jury instruction on the count under Vehicle Code section 4463, subdivision (a)(1), described something that is not a crime because the trial court changed the elements of the offense by combining language about a license plate from a foreign jurisdiction with language about the display of a “false” license plate. “In assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled.” (*People v. Tate* (2010) 49 Cal.4th 635, 696.)

In essence, defendant suggests the People needed to prove he altered the Oregon license plate in some way because, as discussed *ante*, the portion of Vehicle Code section 4463, subdivision (a)(1), that mentions license plates from foreign jurisdictions requires

an alteration or forging of the license plate, and the jury instruction carried over language about a license plate from a foreign jurisdiction. However, the theory argued in this case makes it irrelevant that the license plate had been validly issued by the state of Oregon at some point in time. While the prosecutor's closing argument referred to the fact that the license plate on the Ford Explorer was from Oregon, she concluded her point by saying, "It doesn't go with the Ford." At no point did the prosecutor argue to the jury that defendant had altered or forged the Oregon license plate; she instead relied on the fact that he had placed a license plate registered to a Chrysler on a Ford Explorer.

Since, as we established *ante*, Vehicle Code section 4463, subdivision (a)(1), criminalizes the display of any license plate that is "false," the People did not need to prove that the license plate defendant affixed to his Ford Explorer was from a foreign jurisdiction before they could prove defendant had committed the felony described in the statute. "It is difficult to see, [therefore], how the [inclusion of 'foreign jurisdiction' language] could have misled the jury in any way. . . . No argument was addressed to the jury by either prosecution or defense which was influenced by this segment of the instruction. We decline to find that the giving of this segment was error, holding that at most it may have been unnecessary surplusage." (*People v. Anderson* (1989) 210 Cal.App.3d 414, 425.) Consequently, we find no error in the way in which the jury was instructed on the count for fraudulently displaying a false license plate.

3. *Construing Vehicle Code section 4463, subdivision (a)(1), as the trial court did does not render Vehicle Code section 4462 irrelevant*

Relying on the rule set forth in *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*), defendant's final assertion regarding the conviction for felony display of a false license plate with fraudulent intent is that Vehicle Code section 4463, subdivision (a)(1), cannot apply to cold plating a car because such an interpretation of the statute would render Vehicle Code sections 4462, subdivision (b), and 4462.5 mere surplusage. "Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute. [Citation.] . . . 'Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and "requires us to give effect to the special provision alone in the face of the dual applicability of the general provision . . . and the special provision" ' " (*People v. Murphy* (2011) 52 Cal.4th 81, 86 (*Murphy*)).

The *Williamson* rule applies either when the general statute and the specific statute share the same elements, or "when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.'" (*Murphy, supra*, 52 Cal.4th at p. 86.) When the general statute includes an element not present in and imposes a punishment harsher than the special statute, "it is

reasonable to infer that the Legislature intended to punish such conduct more severely.” (*Id.* at p. 87.) As a result, the *Williamson* rule will not apply when, for example, the felony statute requires a more culpable mental state than the misdemeanor statute. (See, e.g., *People v. Watson* (1981) 30 Cal.3d 290, 295-297, superseded by statute on another point as stated in *People v. Bradford* (1994) 22 Cal.App.4th 433, 439.)

Here, Vehicle Code sections 4462 and 4462.5 require a different mental state from Vehicle Code section 4463. Vehicle Code section 4462.5 states a person commits a misdemeanor when he or she violates Vehicle Code section 4462, subdivision (b)¹, “with intent to avoid compliance with vehicle registration requirements.” In contrast, Vehicle Code section 4463, subdivision (a)(1), makes it a felony to, among other things, display a license plate that is “false” with “fraudulent intent.” The jury in this case was instructed that “fraudulent intent” meant an intent “to deceive another person either to cause a loss of money, goods, or services, or something else of value, or to cause damage to a legal, financial, or property right.”

Defendant asserts there is no meaningful difference between the mental states required by Vehicle Code sections 4462 and 4462.5 and Vehicle Code section 4463 because an intent to avoid compliance with registration requirements is the same as an intent to deprive the California Department of Motor Vehicles of registration fees. We disagree. It is a misdemeanor to display a license plate registered to a different vehicle

¹ Subdivision (b) of Vehicle Code section 4462 makes it unlawful to display a license plate “not issued for that vehicle.”

with the intent to avoid any registration requirements imposed by two chapters of Article 1 of the Vehicle Code. (Veh. Code, § 4462.5.) These requirements include not only paying registration fees (Veh. Code, § 4000, subd. (a)), but also obtaining a smog certificate (Veh. Code, § 4000.3, subd. (a)), proper certification and mailing of a certificate of ownership upon transfer of a vehicle (Veh. Code, § 5600), and providing proof of compliance with the state's financial responsibility laws (Veh. Code, § 4000.37, subd. (a)). The intent required by Vehicle Code section 4463, subdivision (a)(1), is simultaneously narrower, because it only applies to a person who intended to defraud, and more culpable, because it may more predictably cause an actual loss of monetary benefit to the California Department of Motor Vehicles. Defendant offers no reason why it was unwarranted to assume that he had the lesser intent when he was arrested for violating the misdemeanor statute on November 29, 2012, but that he had the greater intent to defraud when he had still not corrected the violation nearly seven months later; the 2012 arrest notified him of the need to properly register the Ford Explorer, such that his continued refusal to comply could easily be attributed to a desire to avoid paying fees rather than a simple failure to obtain proper certificates and documentation.

For these reasons, a person may violate Vehicle Code sections 4462 and 4462.5 without also violating Vehicle Code section 4463. Consequently, the *Williamson* rule does not apply in this case.

*B. The Evidence is Sufficient to Support the Finding that Defendant Committed
Felony Indecent Exposure*

Defendant attacks the sufficiency of the evidence supporting the conviction for felony indecent exposure. Penal Code section 314, subdivision 1, makes it a crime for a person to “[e]xpose[] his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby.” Although a violation of subdivision 1 of Penal Code section 314 is by default a misdemeanor, the offense becomes a felony if the defendant has a prior conviction under the same subdivision. (§ 314.) “The separate requirement that the intent of the actor be ‘lewd’ is an essential element of the offense declared by section 314.” (*In re Smith* (1972) 7 Cal.3d 362, 365.) Since conduct cannot be “lewd” unless it is sexually motivated, a defendant may not be convicted of violating section 314, subdivision 1, without proof that he “not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.” (*Id.* at p. 366, fn. omitted.)

In this case, defendant insists he cannot have acted lewdly because he did nothing to call attention to his naked genitals for purposes of arousing himself or anyone else. What he ignores is that a sexual “affront” will suffice. (*In re Smith, supra*, 7 Cal.3d at p. 366.) Multiple neighbors testified to having told defendant that his nudity was not only offensive, but sexually offensive. Neighbors had repeatedly asked defendant to wear clothing when he was outside, and they complained he was often naked on their

property in addition to on his own. In addition, small children in the neighborhood were exposed to and had made comments about defendant's persistent nudity. That a neighbor had previously heard defendant masturbating in his yard would only serve to increase the sexual nature of the objection the people who most frequently viewed defendant in the nude had to defendant's persistent nakedness. Moreover, at the time of the exposure that led to the felony indecent exposure charge at issue in this appeal, defendant had already been ordered by a court to keep his buttocks and genitals covered when outside. He continued to appear naked on his property and the property of others an "uncountable" number of times, thereby indicating he maintained his view, "That he can be nude and no one can tell him that he can't and he would be nude 365 days a year." Because defendant knew his frequent nudity constituted a sexual affront in the eyes of his neighbors, he engaged in "lewd" behavior when he continued to be naked in places where they could see him.

Defendant vigorously argues that nudity, without more, is not punishable as indecent exposure under section 314, subdivision 1, because the *In re Smith* court noted, "It is settled that mere nudity does not constitute a form of sexual 'activity.'" (*In re Smith, supra*, 7 Cal.3d at p. 366.) *In re Smith* is so distinguishable as to have no application here. There, the defendant was arrested for sunbathing nude on a beach that "was not in a residential area and was apparently used by relatively few people." (*In re Smith, supra*, 7 Cal.3d at p. 364.) Here, in contrast, the People proved more than "mere nudity." (*Id.* at p. 366.) They showed not only that defendant was nude within view of

others on the date alleged in the information, but that he chose this course of action with full knowledge that his nakedness sexually offended his neighbors. The evidence is therefore sufficient to support the conviction for felony indecent exposure.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.