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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL MAGALLON CEJA,

Defendant and Appellant.

F065014

(Super. Ct. No. 11CM7665)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Abel Magallon Ceja was convicted in a jury trial of one count of indecent exposure (Pen. Code,¹ § 314, subd. 1). In a bifurcated proceeding, defendant admitted he had suffered prior convictions for indecent exposure and lewd conduct with a minor (§ 288, subd. (a)), elevating his current offense to a felony, and he suffered two prior strike convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court subsequently sentenced him to a total term of 25 years to life.

On appeal, defendant contends the evidence was insufficient to support the conviction, the trial court erred in failing to give an instruction regarding the lesser offense of lewd conduct, and the trial court abused its discretion in excluding the testimony of a defense witness. We find these claims without merit and affirm the judgment.

FACTS

Judy Torres was working as a correctional officer at Corcoran State Prison on September 7, 2011.² She worked in an inmate housing unit populated by approximately 200 inmates. The unit has a total of six showers, and the inmates choose which shower to use. The shower doors have metal bars allowing the officers to observe the inmate showering. However, a solid metal privacy panel across the middle of the door covers a person's genitals. There is a "cuff port," a small rectangular opening in the metal panel that provides an officer access to place or remove restraints on the inmate. The shower head is on one of the side walls of the shower, so if an inmate is facing the shower head, his body is not facing the door.

On the date in question, while working in the office, Torres observed defendant in the shower on the lower tier positioned directly across from the office. Her attention was drawn to defendant when she noticed him making stroking motions with his hands.

¹All further references are to the Penal Code unless otherwise indicated.

²All further references to dates are to the year 2011.

Torres looked at defendant and observed him holding his erect penis with his left hand while stroking it back and forth with his right hand. She saw defendant staring directly at her and smiling while he was masturbating. Torres was able to see defendant's penis because he had positioned himself directly in front of the cuff port, making his genitals visible.

Torres immediately flashed her flashlight at defendant, indicating for him to stop. This was a common way within that unit to get an inmate's attention. Despite flashing the light at defendant for four to five seconds, defendant continued to engage in his behavior. Defendant also continued to make eye contact with Torres and smile during this time. Defendant did not make any noise or call out to Torres during the incident. Torres exited the office and approached defendant, telling him in Spanish to turn off the water and exit the shower. Defendant complied. When defendant exited the shower, he had only his clothing with him and a clear plastic soap container. Torres did not look inside the container.

Defendant did not continue to masturbate or expose himself after Torres verbally told him to stop. Once she told defendant to exit the shower, she told him she was going to write him up for a rule violation; she then notified her supervisor. Defendant tried to tell her something, but she told him she did not want to hear from him.

Masturbating in the shower is against the prison rules. In her 15 years of experience working as a correctional officer, Torres had only seen inmates masturbating in the shower approximately three times. Torres noted she had been working in the unit where defendant was housed for approximately six weeks prior to the incident. On several occasions during that time, she had observed defendant staring at her and tracking her movements, and she had instructed him to stop.

Janet Cabatu was working as a correctional officer at Corcoran State Prison on January 13, 2010. On that date she was in the upper control booth when she saw defendant in the shower directly across from the booth, facing the office, making eye contact with her, and masturbating. Defendant was positioned so that she could see his

penis through the cuff port. Although they worked at the same prison, Cabatu had never met Torres before. The two only met briefly when they passed each other as they were going to speak to the prosecutor about the case shortly before trial.

DISCUSSION

I. The Evidence Was Sufficient to Support the Conviction

When a defendant challenges the sufficiency of the “evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) Further, we review “the evidence in the light most favorable to the prosecution, [asking whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) “Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.” (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

To establish indecent exposure, “(1) the defendant must willfully and lewdly expose the private parts of his person; and (2) such exposure must be committed in a public place or in a place where there are present other persons to be offended or annoyed thereby.” (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 982; see § 314, subd. 1.) Nudity alone does not suffice to show the offense; rather, the defendant must have a

lewd, sexually motivated intent. (*In re Smith* (1972) 7 Cal.3d 362, 365-366.) Thus, the defendant must intend not only to engage in the exposure, but must also intend “to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.” (*Id.* at p. 366.) The requisite lewd intent exists if the defendant acted for the purpose of his or her own sexual arousal, or to sexually arouse or sexually affront others. (See *People v. Archer* (2002) 98 Cal.App.4th 402, 405-406 & fn. 2.)

Defendant contends the evidence was insufficient to support his conviction on two elements. First, he argues the evidence failed to establish he intended to direct public attention to his genitals and second, he claims the evidence did not support a finding Torres was “present” while he committed the offense. We find the evidence was sufficient to support the charge.

Intent Element

Defendant argues the evidence was insufficient to support the intent requirement of indecent exposure and claims “the evidence presented at trial directly contradicted any suggestion [defendant] *intended* to direct public attention to his genitals.” Not so. The evidence established defendant had a choice of six showers in the area and he chose the shower directly across from where Torres was standing. He positioned himself so his genitals were visible through the cuff port, facing away from the shower head, and he made eye contact with Torres, smiling at her while he masturbated. Significantly, defendant continued to masturbate after he made eye contact with Torres and after she signaled him with her flashlight to stop. Moreover, defendant had been staring at Torres in the days leading up to the incident to such an extent she had to talk to him to tell him to stop. Finally, defendant had previously engaged in almost identical behavior with another female officer. From this evidence, the jury could reasonably infer defendant intended to direct Torres’s attention to his genitals.

Defendant, pointing to evidence that he did not yell or otherwise make any noise and that he stopped masturbating when Torres approached and told him to turn off the water, claims the evidence was insufficient on the issue of his intent. Defendant’s

argument misses the mark on two points. First, defendant “overlooks the fact that intent is rarely susceptible of direct proof and ordinarily must be inferred from a consideration of all the facts and circumstances shown in evidence. And, it necessarily follows, that if the evidence is sufficient to justify a reasonable inference that the requisite intent existed, the finding of its presence in a particular case, may not be disturbed on appeal.” (*People v. Lyles* (1957) 156 Cal.App.2d 482, 486.)

Second, defendant is essentially asking this court to substitute our judgment for the jury’s. However, our task is simply to determine whether any evidence supported the verdict, and it is not within our province to reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) While counsel may be able to suggest alternative conclusions that could be drawn from the evidence, the jury’s findings here were also reasonably drawn and were strongly supported by the evidence. Thus, defendant’s claim fails.

Presence Element

We likewise reject defendant’s argument, unsupported by authority, that the evidence was insufficient to support a finding Torres was “present” within the meaning of the statute. First, we note the statute only requires a defendant to expose himself in a “place where there are present other persons to be offended or annoyed thereby.” (§ 314, subd. 1.) Torres testified she was working as a floor officer that day and her duties comprised watching the inmates. This included observing inmates while they showered to make sure they were not doing anything inappropriate, such as hiding contraband. Torres was *present* in the office, which is composed of windows, *watching* the inmates in the building, as she is required to do, when defendant engaged in the offending activity. Defendant was in the shower directly across from where Torres was monitoring the inmates. People’s exhibit 4 showed a view from the office where Torres was standing to the shower defendant was using. The photograph shows no obstructions between the office and the shower; they are clearly all part of the same room. That Torres was entrusted with monitoring the inmates in the area, that she was in the same building as

defendant, and that she could easily see defendant from her location provide substantial evidence to support a finding she was “present” within the meaning of the statute. Consequently, defendant’s argument fails.

II. The Court Properly Instructed the Jury

Defendant next maintains the trial court committed reversible error in failing to instruct the jury, sua sponte, on the elements for lewd conduct as a necessarily included lesser offense of indecent exposure. Defendant’s argument lacks merit.

A court’s duty to instruct the jury properly on the general principles of law includes the requirement to instruct on lesser included offenses:

“It is settled that a court must instruct on general principles of law that are closely and openly connected with the facts of the case. [Citation.] The duty to instruct sua sponte on general principles encompasses the duty to instruct on defenses that are raised by the evidence, and on lesser included offenses when the evidence has raised a question as to whether all of the elements of the charged offense were present. [Citation.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1129.)

The duty to instruct on a lesser included offense arises when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

The threshold inquiry necessitated by defendant’s claim of error in failure to give a disorderly conduct instruction is whether, under the facts presented in the case before us, disorderly conduct is a necessarily included offense of the charged crime of indecent exposure.

“To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the ‘elements’ test and the ‘accusatory pleading’ test) must be met. The elements test is satisfied when “all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.” [Citation.] [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense “if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily

committed.” [Citation.]’ [Citations.]” (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

“The evidence adduced at trial is not to be considered in determining whether one offense necessarily is included within another.” (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 454.) “In making this determination, one looks to the elements of the offenses—not the evidence regarding the commission of the offenses.” (*People v. Reed* (2000) 78 Cal.App.4th 274, 281.)

Relying on *People v. Swearington* (1977) 71 Cal.App.3d 935 and *People v. Curry* (1977) 76 Cal.App.3d 181, defendant argues the jury should have been instructed regarding the offense of lewd conduct. Section 647, subdivision (a) provides that every person “[w]ho solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or any place open to the public or exposed to public view” is guilty of a misdemeanor. The court in *Swearington* held that if the defendant possessed the necessary specific intent to constitute felony indecent exposure, the defendant also necessarily committed the misdemeanor offense of lewd conduct. (*People v. Swearington, supra*, at pp. 943-945.) In *Curry*, the court followed its prior opinion in *Swearington*, noting “‘lewd conduct’ is a necessarily lesser included offense within that of indecent exposure.” (*People v. Curry, supra*, at pp 186-187.)

Following the decisions in *Swearington* and *Curry*, the California Supreme Court in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 clarified that the terms “lewd” and “dissolute” as used in section 647, subdivision (a) are synonymous. The court held the terms refer to conduct that involves the touching of the genitals, buttocks, or female breast for the purposes of sexual arousal, gratification, annoyance, or offense if the actor knows or should know of the presence of persons who may be offended by this conduct. (*Pryor v. Municipal Court, supra*, at p. 256.)

Since *Pryor*, appellate courts have held section 647, subdivision (a) is not a lesser and necessarily included offense of felony indecent exposure. (See *People v. Meeker* (1989) 208 Cal.App.3d 358, 362; *People v. Tolliver* (1980) 108 Cal.App.3d 171, 173-

174.) The court in *People v. Meeker* explained it is possible to violate section 314, subdivision 1 (indecent exposure), without violating section 647, subdivision (a) (lewd conduct), since the latter requires “touching” but the former does not. (*People v. Meeker, supra*, at p. 362; see *People v. Rehmeier, supra*, 19 Cal.App.4th at p. 1766 [no touching required to violate § 314].) We agree with this analysis.

Anticipating this ruling, defendant asks this court to reject the holding in *People v. Meeker*, arguing the failure to do so would constitute an absurdity by finding that “lewd” as used in section 647, subdivision (a) requires a touching but “lewdly” as used in section 314 does not. Defendant argues since the term “lewd” as defined by the California Supreme Court in *Pryor* requires a touching, then the term “lewdly” as used in the indecent exposure statute would require the same touching. This argument rests upon the mistaken assumption that *Pryor* defined “lewd” as used in all statutes. Not so. *Pryor* only addressed “lewd” as it was used in section 647, subdivision (a) to prevent the statute from being found unconstitutionally vague. As the court explained, the “terms ‘lewd’ and ‘dissolute’ in this section [section 647, subdivision (a)] are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast 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.” (*Pryor v. Municipal Court, supra*, 25 Cal.3d at p. 256, italics added.) Nowhere does the court hold, nor does the opinion lead to the conclusion, that the same definition should be used in construing the indecent exposure statute. Rather, the court distinguished section 314 from section 647, subdivision (a), explaining the former is not “directed at sexual conduct, as distinguished from indecent exposure, when such conduct is not intended to arouse the prurient interest of an audience.” (*Pryor*, at pp. 255-256.) We note the court had previously separately interpreted the meaning of “lewdly” as used in section 314 as meaning “to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.” (*In re Smith, supra*, 7 Cal.3d at p. 366.) Nowhere in *Pryor* did the court attempt to modify its definition of “lewdly” as used in *Smith* for the indecent

exposure statute. Thus, we reject defendant's invitation to depart from the holding in *People v. Meeker*.

As one can commit the crime of indecent exposure without any touching as required for the offense of lewd conduct, lewd conduct cannot be considered a lesser included offense of indecent exposure under the statutory elements test. (*People v. Meeker, supra*, 208 Cal.App.3d at p. 362.) Defendant's claim fares no better under the accusatory pleading test as the pleading in this case simply mirrored the statutory language. Here the pleading did not allege a touching; therefore, defendant's claim likewise fails under this test. Because the offense of lewd conduct is not a lesser included offense of indecent exposure, the trial court did not err in failing to instruct on that crime, nor was counsel ineffective for failing to request such an instruction.

III. The Trial Court Did Not Abuse Its Discretion in Excluding the Proffered Defense Testimony

Procedural History

Prior to the presentation of the defense case, the prosecutor requested an offer of proof regarding the defense witness's testimony. Defense counsel stated Patricia Ralch, a nurse practitioner at Corcoran State Prison, would testify she treated defendant in August for a rash on his feet and back. On September 1 she saw him again and he continued to complain of itching; he was prescribed a hydrocortisone cream to apply to the affected areas and he was allowed to keep the cream on his person. When she saw him again on September 29, he had a severe rash on his genitalia. The prosecutor argued the evidence was irrelevant as there was no evidence defendant was actually using the cream in the shower. The prosecutor argued:

“[T]he defense is that Officer Torres was confused by what she saw and the defendant was not in fact masturbating, he was simply applying this cream. At that point the testimony of the nurse practitioner concerning the fact that he had a rash and he had cream would be relevant to support that claim, but unless and until again someone testifies that is what he was doing, the fact that he had a rash or that he was applying cream to that rash is not relevant.”

Defense counsel responded, arguing Ralch would testify defendant received another dose of the cream on the date of the incident, he was to apply it twice daily, and the fact she saw him subsequently with a severe rash on his genitalia would constitute circumstantial evidence he was using the cream rather than masturbating in the shower. The trial court questioned whether the witness would be qualified to render an opinion that defendant had a rash on his penis at the time of the incident, and held an Evidence Code section 402 hearing regarding that issue.

During the hearing, Ralch testified when she saw defendant on September 29th, 22 days after the incident, defendant had a “moderate to severe” rash in the groin area. She could not say, however, when the rash would have developed although it would have been more than “just a few days,” and she estimated it could take a “couple of weeks” to develop. Upon further questioning, Ralch stated she could not determine by looking at it when a person developed a rash.

The trial court held Ralch was not qualified to render an opinion as to when defendant developed the rash based only on her observation of it. Given her lack of expertise, the court further found Ralch’s testimony was not relevant concerning whether defendant had a rash on the date in question. However, the court noted that if defendant were to testify he had a rash on the date in question and was applying cream, then Ralch’s testimony would be relevant as to why defendant had the cream and what it was for. The defense inquired as to whether the court would unbifurcate defendant’s priors if he testified, and to what extent he would be impeached with his priors if he chose to testify. The court stated it would unbifurcate the priors if defendant chose to testify, and if he chose to admit the priors, he would still be impeached with his prior convictions although the court would remove the references to age for the section 288 prior. After consulting with his attorney, defendant chose not to testify in the matter.

Analysis

Evidence is admissible only if it is relevant. (Evid. Code, § 350.) All relevant evidence is admissible except as otherwise provided by a statutory or constitutional

exclusionary rule. (See Cal. Const., art. I, § 28, subd. (f)(2); Evid. Code, § 351.) Relevant evidence is defined as evidence “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 general test of relevance ““is whether the evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive.”” (*People v. Bivert* (2011) 52 Cal.4th 96, 116.) However, if evidence leads only to speculative inferences, it is irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) A trial court enjoys broad discretion in determining the relevancy of evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 727.) We review a trial court’s rulings on relevance and the admissibility of evidence for abuse of discretion. (*People v. Aguilar* (2010) 181 Cal.App.4th 966, 973.)

Here the disputed fact of consequence sought to be proven through the testimony was whether defendant harbored the lewd intent necessary to violate the statute. To this end he sought to introduce evidence he had a rash on his feet and back in August, he had subsequently been prescribed a cream for that rash, and he later had a rash in the “groin area” on September 29. Without resort to several speculative leaps, this evidence did not support the inference defendant was applying cream to a rash on his penis on September 7. The testimony did not even support the inference he had a rash on his penis on September 7, as Ralch was not qualified to opine as to when the rash would have originated. Because the proffered evidence did not support the inference defendant had a rash on the date in question, the inference defendant sought would have been speculation. As evidence leading only to speculative inferences is not relevant, the trial court’s ruling was not an abuse of discretion.

Our conclusion is consistent with California Supreme Court precedent. In *People v. Curl* (2009) 46 Cal.4th 339, the defendant was prosecuted for murder. A witness who claimed to have had several conversations with the defendant while the two were both in custody in jail testified the defendant had admitted shooting the victim and provided the witness with details about the murder. (*Id.* at p. 347.) The defense sought to introduce

several newspaper articles about the murder to establish the witness may have gotten the information from the articles rather than from the defendant. (*Id.* at p. 360.) In concluding the evidence was speculative, the court explained there was no evidence the witness had ever read or seen the articles in question, and without such evidence, the articles were irrelevant. (*Ibid.*)

In *People v. Stitely* (2005) 35 Cal.4th 514, 522, the defendant was charged with sodomy murder. There was evidence the victim's blood-alcohol level was 0.26 percent. (*Id.* at p. 548.) The defendant sought to introduce "expert testimony that would establish: (1) the amount of alcohol [the victim] consumed the night she was killed based on her height, weight, and blood-alcohol content, (2) the general effect of that blood-alcohol content in lowering a person's sexual 'inhibitions,' and (3) the general likelihood that a person whose inhibitions had been lowered in this manner would have consented to sexual relations." (*Id.* at p. 549.)

The Supreme Court held the trial court properly excluded this evidence as irrelevant:

"Nothing in the offer of proof showed how [the victim]'s blood-alcohol content and intoxication affected her judgment and behavior the night she was killed, or increased the chance that she did, in fact, consent to vaginal and anal intercourse. Defendant essentially wanted jurors to speculate on intoxication, inhibition, and impulse. Speculative inferences are, of course, irrelevant. [Citation.]" (*People v. Stitely, supra*, 35 Cal.4th at pp. 549-550.)

Likewise here, without any evidence defendant either had a rash or was using the cream in the shower, Ralch's testimony could only lead to speculation. As such, it was properly excluded. The exclusion of this evidence, contrary to defendant's argument otherwise, did not deprive him of the right to present a defense. Initially, we note the court never held that evidence defendant had a rash on the date in question was inadmissible. As the court pointed out, the defense could present such testimony, and once that preliminary fact was established, Ralch's testimony would be relevant as corroborative evidence. The fact the court referred to the presentation of the evidence through defendant himself did

not limit the testimony to defendant, it simply recognized this would be the most likely source of the information. The defense never sought to introduce through any other source the fact he had a rash on the date in question.

Furthermore, it is clear the exclusion of irrelevant evidence does not violate a defendant's right to present a defense. Courts have repeatedly held that although a criminal defendant has the right to present defense evidence at trial, there is no due process right to present irrelevant evidence or evidence that creates a substantial danger of misleading the jury. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [“well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury”]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [“we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted”]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [“As a general matter, the ‘[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant’s right to present a defense’”].) Therefore, defendant’s claim fails.

DISPOSITION

The judgment is affirmed.

PEÑA, J.

WE CONCUR:

LEVY, Acting P.J.

CORNELL, J.