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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OMAR SORTO, Defendant and Appellant.	B293757 Los Angeles County Super. Ct. No. PA089006

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed in part and remanded with directions.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant and defendant Omar Sorto was convicted of two counts of indecent exposure with a prior such conviction. On appeal, he challenges the sufficiency of the evidence of one of those counts. He also argues the case should be remanded for a hearing on his ability to pay court operations assessments, court facilities assessments, and a restitution fine. We reject all of Sorto's arguments. The Attorney General contends the trial court erred by imposing roughly $2,000 less in penalty assessments than it should have, and argues the case should be remanded so the court can hold an ability to pay hearing on these additional assessments and impose them if Sorto is able to pay them. We agree with the Attorney General.

PROCEDURAL BACKGROUND

An amended information charged Sorto with two counts of indecent exposure with a prior such conviction (Pen. Code, § 314, subd. 1; counts one [April 7, 2017] and two [August 6, 2017]).[1] The information further alleged Sorto had served seven prior prison terms. (§ 667.5, subd. (b)).

In bifurcated proceedings, Sorto admitted he had a prior conviction for indecent exposure, and that he had served six prior prison terms. The jury convicted Sorto of both counts.

The trial court struck one of the six prior prison term enhancements, and sentenced Sorto to eight years in state prison, consisting of a three-year upper term on count one, a three-year

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[1] All undesignated statutory references are to the Penal Code.

concurrent upper term on count two, and five one-year terms for the remaining prior prison enhancements.

Sorto timely appealed.

FACTUAL BACKGROUND

A. Count One – April 17, 2017

Megan K. was a custody assistant at the North County Correctional Facility in Castaic, where Sorto was housed in a dorm. On April 17, 2017, at about 9:27 p.m., Sorto approached the bars of the day room and asked Megan K. for a bar of soap. Megan K. walked to her staff station to get the soap. She looked down as she returned, and when she looked up to give Sorto the soap, he was masturbating. While doing so, Sorto faced Megan K. and made eye contact with her. They were less than two feet from each other.

Megan K. was offended. She quickly turned around, tossed the soap on the ground, paused and gathered herself. She walked back to Sorto and obtained his booking number, which was on his wristband. She then informed a sheriff's deputy what had happened.

B. Count Two – August 6, 2017

On August 6, 2017, Los Angeles County Deputy Sheriff Erynn S. was assigned to the North County Correctional Facility. At about 3:35 p.m., she was at a staff station when somebody drew her attention to Sorto. Erynn S. looked in Sorto's direction, and saw him with his penis out of his pants, masturbating in a bathroom stall while looking in her direction and facing her. The bathroom stalls did not have doors, but the stall next to Sorto's

had a makeshift cover with a sheet for privacy. Erynn S. was 25 to 30 feet from Sorto. She had a clear view of him.

Erynn S. felt offended and very uncomfortable. Sorto looked in her direction for approximately three seconds. Erynn S. shined her flashlight at him to get his attention so he would stop. Sorto immediately put his penis back in his pants and walked over to his bunk. He had a bottom bunk with a sheet covering the sides for privacy.

After Sorto was advised of and waived his constitutional rights, Erynn S. asked him if he had been masturbating. Sorto said, "Yes."

DISCUSSION

1. Substantial Evidence Supports Count Two

Sorto does not challenge his conviction on count one, but contends his conviction on count two must be reversed because it is unsupported by substantial evidence. Specifically, he argues the evidence shows he "did not engage in brazen and aggressive behavior[,]" but rather "negligently ignored the risk of having a private moment exposed under the circumstances of the custodial environment." In response, the Attorney General argues that brazen or aggressive behavior is not an element of the crime of indecent exposure, and that even assuming it was, there was substantial evidence of such behavior. We agree with the Attorney General and reject Sorto's substantial evidence challenge.

A person is guilty of indecent exposure if he "willfully and lewdly . . . ¶ [e]xposes 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 . . . ." (§ 314, subd. 1.)

For a jury to find a defendant guilty of this crime, the People must prove the following two elements: (1) the defendant willfully exposed his genitals in the presence of another person or persons who might be offended or annoyed by the defendant's actions; and (2) when the defendant exposed himself, he acted lewdly by intending to direct public attention to his genitals for the purpose of sexually arousing or gratifying himself or another person, or sexually offending another person. (CALCRIM No. 1160.)

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

Applying these principles, we conclude substantial evidence supports the jury's finding that Sorto committed indecent exposure. Sorto stood with his erect penis out of his pants and masturbated in a bathroom stall that did not have a door while facing outward toward Erynn S. and looking in her direction. Based on these facts, it was reasonable for the jury to conclude Sorto willfully and lewdly exposed his genitals in her presence for the purpose of his own sexual gratification, and was therefore guilty of count two. (See § 314, subd. 1; CALCRIM No. 1160; *Smith*, *supra*, 37 Cal.4th at pp. 738-739.)

We reject Sorto's argument that his conduct was "as private as it could be in the county jail restroom." As the Attorney

General points out, Sorto chose to face Erynn S., and he chose an uncovered stall rather than the stall right next to it that was covered with a sheet. Nor do we find persuasive Sorto's argument that he is less culpable under the statute because he was 25 to 30 feet away from Erynn S. as opposed to being right next to her. The statute prohibits indecent exposure in public or in the presence of others. (§ 314, subd. 1.) It does not only prohibit acts of indecent exposure that occur at close range.

As mentioned above, the crux of Sorto's sufficiency argument is the record contains no evidence "that he put himself on display in a brazen or aggressive way." In support of the proposition that brazenness or aggressiveness is an element of indecent exposure, Sorto cites *People v. Honan* (2010) 186 Cal.App.4th 175 (*Honan*). Although *Honan* mentions brazen and aggressive conduct when explaining the theoretical differences between the intent elements of indecent exposure and lewd conduct (§ 647, subd. (a)), *Honan* does not hold brazen or aggressive conduct is an element of indecent exposure. (*Honan*, *supra*, 186 Cal.App.4th at p. 182.) We reject Sorto's contention that additional elements of the offense exist beyond those stated in section 314 and CALCRIM No. 1160.

Even assuming arguendo the People were required to prove Sorto acted brazenly or aggressively, we would still conclude substantial evidence supports the jury verdict. Sorto does not define what "brazen" or "aggressive" mean in this context. But common dictionary definitions of these words reveal the terms apply to Sorto's misconduct. Merriam-Webster defines "brazen" as "marked by shameless or disrespectful boldness" (Merriam-Webster Dict. Online, <https://www.merriam-webster.com/dictionary/brazen> [as of Dec. 12 2019], archived at

<https://perma.cc/7SSR-AY94>), and "aggressive" as "marked by obtrusive energy and self-assertiveness." (Merriam-Webster Dict. Online, <https://www.merriam-webster.com/dictionary/aggressive> [as of Dec. 12 2019], archived at <https://perma.cc/VQ6L-L5D7>.) Sorto's behavior was obtrusive, disrespectful, and inappropriate. It made Erynn S. uncomfortable and disrupted her in the performance of her duties. It is precisely the sort of misconduct the indecent exposure statute is intended to prohibit.

2. Fines and Assessments

The trial court imposed two $40 court security assessments (Pen. Code, § 1465.8, subd. (a)), two $30 criminal conviction assessments (Gov. Code, § 70373), and a $500 restitution fine (§ 1202.4, subd. (b)(1)).[2] The court also imposed a $400 fine under section 290.3 and an additional $1,160 in other penalty assessments. These fines and assessments are reflected in the abstract of judgment and sentencing hearing minute order. The reporter's transcript of the sentencing hearing shows the trial court orally imposed these fines and assessments with the exception of the $1,160 in penalty assessments.

a. *People v. Dueñas*

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Sorto argues due process and equal protection require that we remand his case for a hearing on his ability to pay the court security assessments ($80), criminal conviction assessments ($60), and restitution fine ($500). Sorto concedes he did not object

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[2] The court stayed a $500 parole restitution fine (§ 1202.45, subd. (a)).

to the imposition of the assessments and restitution fine. Sorto has forfeited his *Dueñas* argument by failing to object. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

b. Penal Code Section 290.3 Fine and Other Penalty Assessments

Sorto also argues his case should be remanded for a detailed breakdown of the $1,160 in penalty assessments. The Attorney General agrees the case should be remanded but for different reasons – that the trial court should increase his section 290.3 fine from $400 to $500, impose a second section 290.3 $500 fine, increase the penalty assessments by nearly $2,000, and asserts that Sorto should have the opportunity to request an ability to pay hearing based on these increases. We agree with the Attorney General.

It appears the trial court, instead of imposing one $400 fine under section 290.3, should have imposed two $500 fines under that section unless it determined Sorto did not have an ability to pay both.[3] (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1369

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[3] Section 290.3, subd. (a) states: "Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." The crime of indecent exposure (§ 314) is one of the offenses specified in subdivision (c) of section 290. Sorto was previously convicted of indecent exposure in 2013, and was convicted of two counts of indecent

[because the trial court's imposition of an incorrect amount under section 290.3 constitutes an unauthorized sentence, the error is jurisdictional, and the issue may be raised for the first time on appeal].) Since the trial court erred in imposing the $400 fine, the $1,160 in additional assessments was also incorrect because that sum was calculated using an incorrect $400 base fine. (See *ibid.*) We remand so the court can impose the two section 290.3 $500 fines (unless Sorto requests an ability to pay hearing and the court determines he is unable to pay them). (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750 [burden is on the defendant to request an ability to pay hearing under section 290.3].) Assuming Sorto requests an ability to pay hearing, the court should conduct the hearing "'in light of [Sorto's] total financial obligations,'" which would include an additional $1,550 per $500 fine, for a total of $4,100. (See *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1458-1459 (*Johnson*).)[4] The abstract of

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exposure in this case. Thus, it would have been appropriate here for the trial court to impose two $500 fines unless it determined Sorto did not have the ability to pay them.

[4] The penalty assessments applicable to a $500 base fine under section 290.3 are: (1) a 100 percent state penalty assessment (§ 1464, subd. (a)(1)) equal to $500; (2) a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)) equal to $350; (3) a 20 percent state surcharge (§ 1465.7) equal to $100; (4) a 50 percent state court construction penalty (Gov. Code, § 70372) equal to $250; (5) a 20 percent additional penalty for emergency medical services (Gov. Code, § 76000.5) equal to $100; (6) a 10 percent additional DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)) equal to $50; and (7) a 40 percent additional state-only DNA penalty (Gov. Code, § 76104.7, subd. (a)) equal to $200. (See *Johnson*, *supra*, 234 Cal.App.4th at p. 1458.)

judgment should detail the amount and statutory basis for each base fine and penalty assessment imposed. (*Id.* at p. 1459.)

DISPOSITION

The case is remanded so the superior court can impose the two $500 section 290.3 fines and associated penalty assessments of $1,550 per fine unless it determines Sorto does not have the ability to pay them. In all other respects, the judgment is affirmed. The court is directed to amend the abstract of judgment to reflect the updated fines and assessments, and to forward copies to the Department of Corrections and Rehabilitation.

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CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.