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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSAMA MOUSA et al.,

Defendants and Appellants.

B282777

Los Angeles County  
Super. Ct. No. KA108766

APPEALS from an order of the Superior Court of  
Los Angeles County, Steven D. Blades, Judge. Affirmed.

Emily Lowther Brough, under appointment by the Court of  
Appeal, for Defendant and Appellant Osama Mousa.

Christine C. Shaver, under appointment by the Court of  
Appeal, for Defendant and Appellant Carmen Mousa.

Xavier Becerra, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Steven D. Matthews and David E. Madeo,  
Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

The People charged Appellants with conspiracy to distribute illegal gambling machines, branded as “Skill Thrusters,” and seized approximately 88 of the machines in raids on Appellants’ business, Treasure Box, Inc. (Treasure Box). The trial court dismissed the charges due to the People’s failure to prosecute within the applicable limitations period; however, the court denied Appellants’ request to return the Skill Thrusters, having previously found probable cause to believe they were illegal gambling devices. Appellants filed a motion to recover possession of the machines under Penal Code section 335a,<sup>1</sup> arguing the Skill Thruster is predominately a game of skill. The trial court found the machines were illegal gambling devices under section 330.1 and entered an order for the machines’ destruction. Appellants challenge the order. They contend the court should have granted a continuance to allow them to have an attorney present and they argue the evidence was insufficient to support the court’s finding. We disagree and affirm.

## **FACTS AND PROCEDURAL HISTORY**

Appellants’ company, Treasure Box, manufactures and distributes gaming machines, including the Skill Thruster. The company contracts with businesses around Southern California to place its machines in convenience stores and similar establishments open to the public. Treasure Box and the businesses divide the gaming machines’ proceeds according to the terms of their contracts.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise designated.

The Skill Thruster has many of the features commonly associated with coin-pusher- or quarter-pusher-style games.<sup>2</sup> It consists of an upper sliding shelf and a lower fixed shelf, each piled with quarters and other cash prizes. To operate the game, a player inserts a quarter into the machine and manipulates a device purporting to allow the player to adjust where the quarter will land on the top sliding shelf. As quarters accumulate on the top shelf, some may be pushed over the edge by the shelf's sliding action and the machine's backwall so they fall on the lower shelf. As quarters accumulate on the lower shelf, the sliding upper shelf pushes them forward toward two "house slots" on each side of the lower shelf and a second lipped edge in the middle of the shelf. The player receives the quarters and other prizes that fall over the lipped edge as winnings. The quarters that fall down the house slots are split between Treasure Box and the business owner.

On February 11, 2011, officers with the El Monte Police Department served a search warrant on Treasure Box. The officers seized 45 Skill Thruster machines, as well as money, personal property, and business records. The investigation continued through 2014, resulting in additional seizures of 43 more Skill Thrusters.

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<sup>2</sup> (See Cabot & Csoka, *The Games People Play: Is it Time for a New Legal Approach to Prize Games?* (2003) 4 Nev. L.J. 197, 221-222 [describing common "coin-pusher" game mechanics]; Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement* (2011) 60 Drake L.Rev. 41, 57 [describing "quarter pusher" mechanics].)

On October 9, 2014, Appellants filed a motion under section 1540 for return of the seized property.<sup>3</sup> The trial court ordered the City of El Monte (the City) to return the personal property, business records, and a portion of the seized money. However, the court denied the motion with respect to the Skill Thrusters, concluding the machines were “unlawful to possess” under the Penal Code, and that Appellants “failed to present competent evidence controverting the illegality of the gambling machines.” Before the return of the property was to be completed, the court stayed its order following the filing of a criminal complaint against Appellants.

On January 14, 2016, the trial court held a preliminary hearing to determine if there was probable cause to believe Appellants committed a felony. Detective Raymond Larriva, who led the February 2011 raid, testified about his experience playing a Skill Thruster machine. Following the raid, Larriva set up one of the machines, with the help of two former Treasure Box employees. He played the game approximately 800 times, inserting about \$200 worth of quarters into the machine. Of the \$200, he won back approximately \$32 playing the game.

Larriva testified that in all his 800 plays he was never able to control where a quarter landed on the machine’s upper shelf. Regardless of how he manipulated the device for inserting quarters, he could not direct where his quarter would settle, because the circular coin would bounce and move in

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<sup>3</sup> Section 1540 provides, “If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.”

unpredictable directions once it made contact with the upper shelf. He also noticed that most of the coins fell into the house slots, which were “covered” from view, and that the lip of the lower shelf’s edge was “tilted” up so that heavier prizes (like a \$20 roll of quarters) would come to the edge but not go over it. In addition to playing the game, Larriva read documentation on the Skill Thruster, watched a video about the game, and spoke with the former Treasure Box employees about the machine’s mechanics and how they had been instructed to set up the machines.<sup>4</sup>

Over Appellants’ objection, Larriva testified that in his opinion the Skill Thruster was a “game of chance.”<sup>5</sup> He explained, “I attempted to skillfully place quarters in different parts of the machine based on the information I had and research that I had, and I could not place the quarter on any given spot that I directed that quarter to go to.” As for the instances when he won money, Larriva did not believe anything he did influenced the outcome.

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<sup>4</sup> One former employee, Steven Bierly, also testified at the preliminary hearing. Like Larriva, Bierly testified that regardless of the player’s “attempt” to direct where a quarter would land, “a lot of times it would bounce around [and] roll.”

<sup>5</sup> The court permitted Appellants’ counsel to question Larriva on voir dire about his capacity to testify as an expert. Larriva admitted he had not taken any of the classes offered by the Bureau of Gaming Control and he had not received formal instruction on how to assess whether a particular game is one of chance or of skill. He said he had been permitted to offer an opinion on gaming devices in another case, but he was not qualified as an expert in that case.

On January 28, 2016, the People charged Appellants with conspiracy to distribute illegal gambling devices in violation of section 330.1, subdivision (a).<sup>6</sup> However, on August 29, 2016, the court dismissed the charges, concluding the People had failed to initiate the prosecution within the applicable three-year statute of limitations.

On January 19, 2017, the court held a hearing to address the disposition of the property seized from Appellants. The People had agreed to release additional items of personal property, but would not release the Skill Thrusters, citing the court's probable cause finding that the machines were illegal gambling devices. The trial court agreed the machines could not be released to Appellants in view of the finding, and ordered the machines could be destroyed by the El Monte Police Department after 45 days, unless Appellants filed a motion to recover possession under section 335a.

On February 21, 2017, Appellants, appearing in pro per, filed a motion for return of the seized Skill Thrusters. Appellants urged the court to review the preliminary hearing transcript, and argued the People had not established the machines' illegality because Detective Larriva was not qualified to offer an expert opinion as to whether the Skill Thruster was predominately a game of skill or a game of chance. The People opposed the motion, offering a declaration from Detective Larriva reaffirming his testimony from the preliminary hearing.

On March 21, 2017, the trial court held a hearing on the motion. Appellants appeared in pro per, but said they had

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<sup>6</sup> Section 182 makes it a felony for two or more persons to conspire to commit a crime.

retained an attorney six days earlier. They said the attorney was engaged on another matter, and requested a continuance so he could be present to represent them at the hearing. The trial court denied the request as untimely, emphasizing Appellants had filed the motion in pro per, they had appeared in pro per at the prior hearing, and their purported attorney had not submitted anything to the court to indicate he represented Appellants or to request a continuance due to a scheduling conflict.

Appellants argued the seized Skill Thrusters were not illegal gambling devices because the machines were “predominately game[s] of skill.” They maintained Detective Larriva was not qualified to testify as an expert or to offer the opinion that the machines were games of chance, and requested a continuance to have a machine brought to court so they could demonstrate “where the skill comes in.” The court denied the request, stating Detective Larriva’s testimony at the preliminary hearing, and Appellants’ admission about the game’s mechanics at the current hearing, convinced the court “beyond any reasonable doubt” that the machines violated the Penal Code.

On March 21, 2017, the court entered a destruction order for the machines. Appellants filed a timely notice of appeal.

### **DISCUSSION**

Appellants argue the trial court erred in two respects. First, they contend the court abused its discretion by denying their request for a continuance to have their attorney present at the hearing. Second, they argue the court’s finding regarding the machines’ legality was not supported by substantial evidence. Neither argument has merit.

**1. *The Trial Court Reasonably Exercised Its Discretion to Deny the Request for a Continuance***

The decision whether to grant a continuance in a criminal case is committed to the sound discretion of the trial court and may be reversed only upon a clear showing of abuse. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 287.)

Section 1050 establishes the procedures for requesting and granting a continuance. Subdivision (b) provides that “[t]o continue any hearing in a criminal proceeding . . . (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary and (2) within two court days of learning that he or she has a conflict in the scheduling of any court hearing . . . an attorney shall notify the calendar clerk of each court involved, in writing, indicating which hearing was set first.” (§ 1050, subd. (b).) Under subdivision (d), “[w]hen a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. . . . If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted.” (*Id.*, subd. (d).)

Appellants concede they failed to comply with section 1050, subdivision (b). According to Appellants, they retained counsel six days before the hearing, but they did not file and serve written notice as subdivision (b)(1) requires. Moreover, as the trial court observed, their purported attorney did not notify the calendar clerk of his retention or of his supposed scheduling conflict as required by subdivision (b)(2).



Notwithstanding their failure to comply with subdivision (b), Appellants argue the trial court erred by invoking the City's interest in prompt resolution of the dispute over the seized property. At an earlier hearing, the City had argued it needed authorization to destroy the machines because they were taking up space in its storage facility. Appellants contend the concern was disingenuous, given the City's "lack of diligence" in investigating and prosecuting the case. Thus, they argue their admitted failure to file a timely request was not a proper basis to deny the continuance. We disagree.

In focusing on the City's purported "lack of diligence," Appellants disregard their obligation to demonstrate good cause for failing to comply with section 1050, subdivision (b). As discussed, when subdivision (b)'s requirements are not met, subdivision (d) directs that a "motion for continuance *shall not be granted*" if the moving party "is unable to show good cause for the failure to give notice." (§ 1050, subd. (d), italics added.) Here, Appellants told the court they retained an attorney six days before the hearing, but they offered no explanation for their failure (or their purported attorney's failure) to request a continuance as mandated by section 1050, subdivision (b). In view of this record, the court properly followed subdivision (d)'s directive to deny the request as untimely.

## **2. *Substantial Evidence Supports the Finding that the Machines Are Illegal Gambling Devices***

Section 330.1, subdivision (a) makes it a crime to manufacture, possess, sell, rent, or lease "any slot machine" or gambling device. Subdivision (f) defines a "slot machine" as any device that "may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object

the machine or device is caused to operate . . . and by reason of any element of hazard or chance, the user may receive . . . anything of value . . . .” (§ 330.1, subd. (f).)

Section 335a authorizes any peace officer to seize a slot machine or other gambling device, and gives the superior court jurisdiction to order the destruction or return of such devices. (*Knowles v. O'Connor* (1968) 266 Cal.App.2d 31, 32 (*Knowles*).) The statute requires the officer to post notice of the seizure and to hold the alleged gambling device for 30 days, during which the owner may commence an action “to recover possession of such machine or device.” (§ 335a.) If the court finds the machines to be in violation of any law prohibiting gambling devices, the machine must be summarily destroyed immediately after the court’s decision becomes final. (*Ibid.*)

Certain devices are expressly exempted from the provisions prohibiting gambling devices. Section 330.5 provides that “pin ball, and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not intended to be and are not included within the term slot machine or device as defined within Section[ ] 330.1.”

“The issue of gambling versus skill is largely factual,” although “some kinds of gambling paraphernalia are easily identified as contraband.” (*Williams v. Justice Court* (1964) 230 Cal.App.2d 87, 97 (*Williams*) [observing pin ball machines are too “heterogeneous” to be readily classified as games of chance or skill without considering evidence].) We review the trial court’s factual findings under the substantial evidence standard. (*Knowles, supra*, 266 Cal.App.2d at p. 33.)

Appellants contend the evidence was insufficient to support the court's finding that the Skill Thruster is an illegal game of chance, as opposed to a permitted game of skill. They argue Detective Larriva was not qualified to testify as an "expert" on the matter and, therefore, the court could not rely on his preliminary hearing testimony as the basis for its finding. We disagree.

The fundamental problem with Appellants' argument is it presumes an expert opinion was required to support the court's finding. Expert testimony is not needed when a topic is so common to the normal experience of lay persons that fact finders of ordinary knowledge and education could reach a reasonable conclusion without an expert's assistance. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 45; Evid. Code, § 801.) The "decisive consideration . . . is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the [expert] or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole* (1956) 47 Cal.2d 99, 103.) When a fact finder can draw reasonable inferences based upon the evidence and matters of common knowledge and experience, the lack of expert testimony to support a factual finding is not a ground for reversal. (See, e.g., *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569-1570 [expert testimony was necessary to determine origin of a fire, but was not necessary to find workers, who had been in area before fire and regularly disposed of cigarettes in garbage can, were source of discarded cigarette that caused fire].)

Under California gambling law, “[c]hance” means that “winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill.” (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 592.) The definition accords with the word’s common usage, and the distinction between games for which the outcome is dictated by chance (such as the unpredictable roll of the dice) and those for which the outcome can be influenced by skill (such as raising a flipper with the right timing to direct a pinball) is a matter within the common knowledge and experience of a lay fact finder. Thus, contrary to Appellants’ premise, an expert opinion was not required to support the court’s finding.<sup>7</sup> All the court needed was a description of the Skill Thruster’s mechanics, from which the court could draw a reasonable conclusion as to whether chance or skill predominated in determining the player’s prospect of winning money from the game. (See *Bell Gardens Bicycle Club v. Department of Justice* (1995) 36 Cal.App.4th 717, 722 [“it is the character of the game as revealed by its rules that the courts look to in determining whether the elements of skill or chance predominate in determining the winner”]; *Williams, supra*, 230 Cal.App.2d at pp. 95-96 [affidavits sufficient to support probable cause finding that “‘multiple-coin operated’ pinball machines,” from which “persons playing these machines received gambling

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<sup>7</sup> There also is no indication in the record that, in ruling upon the destruction order, the trial court relied upon Detective Larriva’s opinion. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 [error, if there was one, cannot be presumed from a silent record, but must be affirmatively demonstrated by appellant; “failure to do so may be deemed a waiver of the issue on appeal”].)

payoffs in money,” were illegal gambling devices]; cf. *Knowles, supra*, 266 Cal.App.2d at p. 33 [“the trial court’s finding the [pinball] machines are games of skill is supported by substantial evidence consisting of the representative machine and testimony of its workings and operation”].)

Detective Larriva’s preliminary hearing testimony was sufficient to support the trial court’s finding. Larriva testified that he played one of the seized Skill Thruster machines 800 times with \$200 worth of quarters. He described the operation of the Skill Thruster and his experience playing the game. In all his 800 plays, Larriva said he was never able to control where his quarter might settle or how it would interact with the other coins. He explained that, regardless of how he manipulated the machine, when the coin landed it bounced and moved in unpredictable directions. He also observed that most of the coins fell into the house slots, regardless of how he played the game. As for the coins and other prizes that made it past the house slots, Larriva observed there was nothing he could do to increase his winnings, in part because the lipped edge prevented him from winning the heavier, more valuable prizes. After putting \$200 worth of quarters into the machine, Larriva testified that he won only \$32 back. Based on this testimony, the trial court reasonably concluded the Skill Thruster was not predominately a game of skill, but rather an illegal gambling device.

**DISPOSITION**

The order is affirmed.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J