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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN DESISTO, Defendant and Appellant.	B262564 (Los Angeles County Super. Ct. No. NA098017)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Jeralyn B. Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Steven Desisto in counts 1 and 2 of sexual penetration by foreign object (Pen. Code, § 289, subd. (e)),[1] possession of cocaine in count 4 (Health & Saf. Code, § 11350, subd. (b)), and unauthorized invasion of privacy in count 5 (§ 647, subd. (j)(3)).[2] Defendant was sentenced to nine years in state prison, consisting of terms of six years in count 1, two years in count 2, and one year in count 4. A concurrent sentence of six months was imposed in count 5.

Defendant contends that: (1) the trial court improperly admitted evidence of his prior sexual misconduct; (2) insufficient evidence supports his conviction for unauthorized invasion of privacy; (3) there was no probable cause to support the order subjecting him to HIV/AIDS testing; and (4) the cumulative errors at trial deprived him of due process. We affirm.

FACTS[3]

Prosecution

The Incident

Jane Doe met defendant through some friends in 2013. They were acquaintances, and did not have a sexual or romantic relationship. They saw each other when they were with a group of friends a few times at the House of Hayden bar (Hayden) in Long Beach. Defendant made several sexually inappropriate comments to Jane. On one occasion he told her he would give her $20 to see her breasts.

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

[2] Count 3, eavesdropping in violation of section 632, subdivision (a), was dismissed pursuant to section 1385.

[3] Because defendant does not challenge his conviction in count 4, we do not recount the facts supporting his conviction for possession of cocaine.

On August 6, 2013, Jane ran into defendant as she was leaving Rocco's Deli, which defendant owned. Defendant gave Jane his number and mentioned that there was something going on at the Hayden that night.

At about 7:00 p.m., Jane took a Xanax, which she had been prescribed for anxiety. She was depressed because she had just ended a romantic relationship. At about 9:00 p.m., she went to the Hayden. She had a beer at the bar and talked to the bartender. She noticed that defendant was at the bar about an hour after she arrived. Jane drank two and a half beers and three shots of Fireball liquor before midnight.

At some point, defendant approached Jane, and they talked about her breakup. Defendant bought her two shots, and he had one. Jane began feeling "buzzed" around midnight, but she did not feel drunk. Defendant texted her, "You are pretty hot." Jane texted back, "You're buzzed, silly face." He texted back, "Let's go, beautiful." She did not remember receiving the last text, and did not remember leaving the bar.[4]

The next thing Jane recalled as she was regaining consciousness was lying on her back in a bathtub, completely naked. She had trouble keeping her eyes open, and could not move or talk. Defendant was standing next to the bathtub, in nothing but a shirt. His penis was exposed and erect. He splashed water on her vagina and told her she "[had] the body of an 18-year-old." Jane could not respond. She heard a clicking sound that sounded like a cell phone taking pictures. When she opened her eyes, she saw defendant pointing a cell phone at her.

Defendant digitally penetrated Jane's vagina while she was in the bathtub. She could not move or tell him to stop. He pulled her out of the bathtub and carried her into the living room, where he put her on the couch.[5] Defendant digitally penetrated her vagina again. She told him not to, but she could not move or stop him.

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[4] Pamela Madigan, the bartender at the Hayden, testified that Jane had a beer and a half and two shots of liquor. Defendant had three or four beers and three or four shots of whiskey. Neither of them appeared intoxicated while they were at the bar.

[5] Jane was four feet eleven inches tall and weighed about 108 pounds. Defendant was five feet eleven inches tall and weighed about 230 pounds.

Defendant tried to lead Jane to the bedroom. She was confused and scared, but able to think more clearly. Jane put on her top and skirt, but could not find her underwear or shoes. She grabbed her purse and ran from the residence to a nearby gas station where she got a ride back to her car at the bar. She was unable to reach any friends or family, so she drove herself home.

At 3:22 a.m., Jane looked at her phone and saw a voice message and several texts from defendant. He had texted: "Please come back here. You are not able to walk home." "Where did you go? Where are you?" She responded: "Stay away from me. You took advantage of me when I was drunk. Fuck you."

At 4:01 a.m., Jane texted her friend Shelley Anders, who also knew defendant, and told her that defendant had taken advantage of her when she was drunk. She told Anders that she felt ashamed. She said that she left the apartment barefoot and got a ride back to her car with a total stranger.

Investigation

Jane called the police when she got home. She told the 9-1-1 operator that she went to defendant's apartment to "sleep it off." She woke up naked in his bathtub. Defendant fondled her there and again on his couch.

Officer Daniel Martinez of the Long Beach Police Department arrived at Jane's house at 4:25 a.m. Jane was crying and appeared to be frightened and distraught. He interviewed her about the incident, and then drove her to the hospital to be examined by the Sexual Assault Response Team (SART).

While she waited for a nurse, Jane spoke with Long Beach Police Detective Stacey Holdredge. Jane was crying and appeared very upset. Jane told the detective that she blacked out and could not remember how she got from the bar to defendant's bathtub. She told the detective defendant splashed water on her and put his fingers inside her vagina. She told him to stop, but he did not. Jane believed defendant may have given her a date-rape drug.

A nurse practitioner performed a sexual assault examination on Jane. She advised Jane that the examination was voluntary. Jane asked her to stop about half-way through the examination because it was uncomfortable and painful. The examination revealed that Jane had a knee abrasion, bruising on her left shin and left shoulder, and that she had pain and soreness in her genital area. Swab samples were taken from Jane's mouth, neck, vagina, anus, and vulvar area. Jane told the nurse practitioner that she had been naked in a bathtub with water flowing over her. Defendant was wearing only a T-shirt, and his penis was erect. He put his fingers in her vagina, despite her protests. He digitally penetrated her again on the couch. She again asked him to stop, but he did not. Defendant pulled her into his bedroom. Jane said she was "scared shitless."

Samples taken from Jane's vulvar area and neck contained male DNA, and defendant was a possible contributor. The chances of matching that particular male DNA profile was one in 1.2 quintillion. The ratio of Jane's DNA to the male DNA in the vulvar area was three to one, which made it easy to analyze using conventional methods.

Detective Holdredge did not specifically request laboratory testing of Jane Doe's blood or urine for date-rape drugs, because she was told that such drugs typically stay in the body for only one to two hours,[6] and because she believed that a standard toxicology screening would include testing for date-rape drugs. A routine toxicology analysis includes screening for three common date-rape drugs. The toxicology analysis of Jane Doe's blood and urine did not reveal the presence of any of these three drugs.

In a recorded phone call on September 8, 2013, defendant acknowledged that Jane came to his home on the evening of August 6. He said Jane was very drunk and threw up in his bathroom. When he went into the bathroom to make sure she was alright, he found her naked in his bathtub. Defendant helped Jane to the couch. She got dressed and left.

On September 11, officers searched defendant's residence and recovered Jane's shoes and underwear from defendant's bedroom. Detective Holdredge confiscated defendant's cell phone. A technical forensics examiner inspected the phone and found it

[6] Dr. Marvin Pietruzka, a pathologist, testified that the three date-rape drugs tested can stay in the body for 12 hours or more.

was used to take four photographs on August 7, 2013, between 1:00 a.m. and 1:30 a.m. All four had been deleted between August 26 and September 9. The examiner recovered one of the photographs, which depicted Jane naked in the bathtub.

Prior Sexual Misconduct

Bonnie H.

In 1994, when Bonnie H. was 13 years old, she and three friends became lost in Long Beach. Defendant offered to take them to the shopping area, so they got into his car.

Defendant drove them to his clothing shop. Defendant asked Bonnie to try on a bathing suit. She was uncomfortable, but her friends encouraged her to try it on, so she did. After trying the swimsuit on, Bonnie changed back into her clothes in the bathroom. When she came out, her friends were gone, and the front window blinds of the shop were closed. Defendant said he sent her friends across the street to get sodas. He wanted to measure Bonnie in order to make a bathing suit that fit. Defendant first asked Bonnie to strip down to her underwear so that he could take accurate measurements. He then had her remove her underwear. Bonnie was scared, but she complied. While he measured her he touched her nipples, breasts, and vaginal area. He also put his fingers inside her.

Bonnie's friends knocked on the door and asked to come inside. Defendant said he did not want them to see what he was doing. Bonnie was afraid that he was going to rape or kill her. She quickly put on her clothes and ran outside.

Defendant drove the girls home. Bonnie was embarrassed and did not want to tell her friends what happened. The next day, she reported the incident to the police.

K.B.[7]

[7] K.B. was unavailable at trial, and her prior testimony was presented to the jury.

K.B. worked at defendant's deli in 2012, when she was 20 years old. In August 2012, K.B., defendant, and K.B.'s cousin, Allison, were drinking in a bar across from the deli. She became intoxicated after defendant ordered her multiple alcoholic drinks. They went to defendant's apartment. While K.B. was throwing up in the sink, defendant put his hands inside her pants and rubbed her buttocks. She tried to move away, but he kept touching her. He offered her cocaine, which she declined. She fell asleep on his sofa.

Later in 2012, K.B. went to a bar with defendant, Allison, and some other coworkers. Defendant bought alcohol for K.B. and Allison. Afterwards, they went to the deli. While K.B. was making a sandwich, defendant came up behind her and squeezed her buttocks. She was uncomfortable and moved away. Defendant had previously made sexual comments to her like, "Oh, you got a great ass." K.B. also saw defendant touch her coworker Megan on her buttocks at the deli.

K.B. stopped working at the deli. In early 2013, when she was helping with a catering order for the deli, defendant asked her to work there again. They went to the Hayden to talk. At the bar, defendant put his hand under her skirt and touched her bare thighs and buttocks. She pushed him away and left.

K.B. did not report the incidents because she thought she would get in trouble for underage drinking. She contacted the police after learning that they were looking for other potential victims of defendant's misconduct.

Megan O.

Megan O. worked at Rocco's Deli for two weeks in November and December of 2012. Defendant grabbed her buttocks on her first day of work. Defendant brought out alcohol at the end of the shift. Megan and two other girls had a drink. On other days, defendant frequently groped Megan's buttocks as he walked by. She asked him to stop many times, but he "laughed it off." Megan saw defendant touch K.B. on her buttocks multiple times.

Once, when defendant was berating another female employee, Megan told him to stop. He pulled her into the back office and yelled at her. He asked if she had a problem working there, and she replied: "I have a problem with how you are treating her. I also have a problem with how many times you touched my ass." Megan quit a few days later. She told Tony, the other owner of the deli, that defendant had touched her inappropriately. She contacted the police after seeing a press release seeking other witnesses.

Defense

Defendant's Testimony

Defendant testified that he first met Jane in April 2013 at the Hayden through a friend. Over the next few months, he saw Jane six or seven times. On August 6, Jane came into defendant's deli. They talked and exchanged phone numbers. They decided to meet at the Hayden that night.

Defendant went to the Hayden at about 10:00 p.m. He sat near Jane at the bar, and asked how she was doing. Jane started crying. She was upset about a relationship break-up. Defendant ordered her a shot of Fireball whiskey. He thought she had one beer before he got to the bar. Defendant had two beers and three or four shots of whiskey. At 11:58 p.m., defendant texted Jane, "You are pretty hot." She responded, "You are buzzed, silly face."

Defendant started to leave around midnight. Jane asked if she could go with him. The music was loud, so he texted her, "Let's go, beautiful." Jane did not stumble or appear intoxicated. He drove her to his apartment where they sat on the couch and talked. Jane started feeling sick after she had been there about 10 minutes.

Defendant took her to the bathroom, and sat her on the edge of the bathtub so that she could throw up in the toilet. He left, closing the door behind him, and returned to the couch. Defendant opened the bathroom door when he heard something hit the floor.

Jane was sitting on the floor between the bathtub and the toilet. There was vomit on the toilet seat. Defendant helped Jane stand and told her to clean herself up. He closed the bathroom door and went back to the couch.

When he returned to the bathroom 20 minutes later, Jane was naked in the bathtub. He asked her what she was doing. Jane had her eyes open and appeared to be listening to him. Defendant turned on the faucet, gave Jane soap and a washcloth, and told her to clean up. After another 20 minutes, defendant returned to the bathroom. Jane was still lying in the bathtub. He told her that she needed to clean up and leave. Defendant took three or four photographs of Jane in the bathtub, which he intended to show her the next day to convince her that she needed help. He did not ask Jane's permission before taking the pictures. She knew that he was photographing her. She turned away with her eyes closed.[8] He sprayed Jane's face with a hand-held showerhead. He handed Jane the showerhead and left the bathroom again. About 15 minutes later, at around 2:00 a.m., defendant helped Jane out of the bathtub and handed her a towel.

Jane came out of the bathroom, still wrapped in the towel. She sat next to defendant on the couch. She rubbed his leg, but he rejected her advances and asked her to leave. At some point, Jane got dressed, and left. The next day, defendant's housekeeper found Jane's shoes and panties in the bathroom and put them on defendant's dresser. Jane had never gone into his bedroom.

At 2:55 a.m., defendant texted Jane: "Please come back here. You are not able to walk home." "Where did you go?" He planned to drive her home or call a taxi for her. Defendant went to bed. The next morning, he saw Jane's text accusing him of taking advantage of her while she was drunk. At 12:09 p.m., defendant responded: "Took advantage of you? Are you kidding me? I sobered you up and baby-sat you until you left." At 12:39 p.m., she replied: "Why was I naked in your bathtub and you were finger-fucking me? Your pants were off with your dick out, that's baby-sitting?"

Defendant responded that he was a "perfect gentleman." He said she had gotten

[8] Defendant deleted the photographs of Jane a few days later.

into the bathtub herself to sober up and had been masturbating. He texted, "You were the one getting frisky and asking for a massage." Jane asked why she was naked and why his fingers were in her vagina. Defendant responded that she undressed herself and touched her own vagina.

Defendant testified that he was wearing shorts the whole time he was in the bathroom with Jane. He denied putting his fingers inside her vagina.

Defendant disputed Bonnie, K.B., and Megan's accounts of what happened. Bonnie's testimony was mostly true, but she never took her panties off. He did not touch her vaginal area. He only touched her breasts with the measuring tape, and not in a sexual way. Defendant admitted that he pled no contest to committing sexual battery by restraint against Bonnie in 1995. He knew what he had done was wrong.

Defendant denied touching K.B.'s bare buttocks. He explained that Megan accused him of "grabbing [her] ass" after they argued at the deli. He paid her and she stopped working at the deli. He had brushed against the buttocks of his employees several times because the sandwich-making area of the deli was a very tight space. This was common in the industry and not sexual in nature.

Pathologist's Testimony

Pathologist Marvin Pietruzka testified that date-rape drugs typically remain in the body for 12 hours or more. One particular drug, GHB, has a lifespan in the body for 20 to 50 minutes. It can be identified during the first six hours in most people, and a small percentage of people maintain the drug for up to 12 hours.

DISCUSSION

Admission of Evidence of Prior Sexual Misconduct

Defendant contends that the trial court abused its discretion in admitting Bonnie's testimony because his past conduct was unlike the conduct alleged in the instant case, and it was an isolated and uncharacteristic act that occurred approximately 20 years before trial. He argues that the evidence was more prejudicial than probative under Evidence Code section 352, and violated his constitutional rights. We find no abuse of discretion and no constitutional violation. Admission of the evidence was not error or prejudicial.

Legal Principles

Evidence Code section 1108 permits admission of evidence of a defendant's commission of another sex offense in a prosecution for enumerated offenses, including sexual penetration by foreign object in violation of section 289, subdivision (e), as was charged in this case. (Evid. Code, § 1108, subds. (a) and (d).) Evidence offered pursuant to Evidence Code section 1108 is subject to exclusion under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Accordingly, evidence of other sexual offenses cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (Evid. Code, § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907, 916-919 (*Falsetta*); *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

"[T]rial courts . . . must engage in a careful weighing process under [Evidence Code] section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or

distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra*, 21 Cal.4th at pp. 916-917.)

Proceedings

Prior to trial the prosecutor moved for admission of evidence of defendant's prior sexual misconduct against five victims—Bonnie H., Rebekah S., R.C., K.B., and Megan O. The prosecutor outlined the evidence she proposed to introduce under Evidence Code sections 1101, subdivision (b),[9] and 1108. Defendant objected on the grounds that the prior sexual misconduct evidence was remote in the case of the first two victims, and not sufficiently similar to be probative as to all five victims. He argued the evidence was unduly prejudicial pursuant to Evidence Code section 352, and violated his right to due process under the Fourteenth Amendment.

The trial court conducted a pretrial hearing on the issue of the admissibility. With respect to the first victim, Bonnie H., defendant had been charged with sexual battery by restraint (§ 243.4) in October of 1994. He pled no contest to the felony, but the offense was later reduced to a misdemeanor and then dismissed. Defense counsel argued that the cases were dissimilar. He argued that Bonnie H. consented to the touching, and that no vaginal penetration was involved. The incident was also very remote in time, as it had occurred 20 years before the trial.

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[9] Evidence Code section 1101, subdivision (b), permits the introduction of evidence that "a person committed a crime, civil wrong or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

The prosecution argued that the cases were similar. In both cases, defendant used a position of power to get a vulnerable female alone and exploit the situation. Although the incident involving Bonnie H. was 20 years old, defendant was on probation for 10 years afterward, and the next sexual misconduct occurred only 6 years after his probation ended.

The court concluded evidence of the incident was admissible. Defendant had clearly committed a sexual offense under Evidence Code section 1108, subdivision (d)(1)(A), and the offense was very similar to the one in the instant case. It rejected the argument that Bonnie had consented. Not only had defendant pled guilty, Bonnie was not of sufficient age to offer legal consent. Both Jane and Bonnie were extremely vulnerable—Jane was intoxicated and Bonnie was young and isolated from her friends. Neither victim was in a position to defend herself. The remoteness of Bonnie's case was only one factor to consider. Under the totality of the circumstances, the trial court ruled the probative value of the evidence was not substantially outweighed by its potential for prejudice.

The day after the court made its ruling, defense counsel raised the issue of exclusion again, this time arguing that Bonnie was only 13, and that the jury would view what happened as child molestation, which would be highly inflammatory and violate defendant's due process rights. The trial court stood by its ruling.

The trial court excluded evidence of the incident involving Rebekah S., which also occurred in October 1994. Rebekah was 17 years old at the time. The incident was almost identical to the one involving Bonnie, but no formal charges had ever been brought. Because defendant had never been charged, the trial court reasoned it would be exceptionally difficult for defendant to defend himself given how long ago the incident occurred.

The court also excluded evidence relating to a deli employee, R.C., involving a claim of touching of the victim's leg and buttocks, and excessive hugging, but no touching of the vaginal area. All of the touching took place in public. The victim made

no allegations against defendant until her employment was terminated. The court concluded the evidence was not sufficiently similar.

The court admitted evidence of defendant's conduct against K.B. and Megan because the incidents had similarities to Jane's case. In both instances, defendant was in a position of power because he was the victim's employer. In K.B's case, defendant had purchased alcohol for her, despite the fact that she was too young to drink legally, and touched her under her clothing when she was sick in his bathroom. In Megan's case there was also evidence of giving an under-age employee alcohol, and engaging in inappropriate touching. Defendant does not challenge these rulings on appeal.

Discussion

The trial court did not abuse its discretion. There were important similarities in defendant's conduct with Bonnie. Defendant was in a position of power in both instances. Defendant found Bonnie when she was lost in Long Beach, and took her to his clothing shop—an area over which he exercised control. He ensured that Bonnie was isolated, sending her friends away when she was still in the bathroom and could not have protested or left with them. He closed the blinds so that they could not be seen and had Bonnie undress under false pretenses. She was extremely vulnerable due to her youth and complied with his requests because she was afraid. Defendant touched her vaginal area, and put his fingers "inside her."

Defendant took Jane from a bar filled with people to his apartment—also a location over which he exercised control—effectively isolating her. Jane too was extremely vulnerable. She was so intoxicated that she did not even remember leaving the bar with defendant. During both incidents of digital penetration Jane was still incapacitated and unable to remove herself from the situation. As defendant had done with Bonnie, he put his fingers inside Jane's vagina.

The offenses were also similar in severity, such that the prejudicial effect of admitting evidence of Bonnie's case was not likely to be unduly prejudicial. Although

Bonnie was substantially younger than Jane, her vulnerability was highly probative of defendant's propensity to prey on victims over which he had a significant advantage. In Bonnie's case defendant engaged in less touching, digitally penetrating her only once. In comparison, Jane, a person of very small stature at a height of only four feet eleven inches, and a weight of only 108 pounds, was unconscious when defendant undressed her and undressed himself. When she awoke she did not know what had happened and could not move to defend herself. Defendant digitally penetrated her twice, and was pulling her into his bedroom when she ran barefoot from his apartment.

Although the offense involving Bonnie occurred years earlier, it had resulted in a criminal prosecution, affording defendant the opportunity to gather evidence in his defense at a time when it was fresh. He ultimately pled no contest to sexual battery by restraint (§ 243.4), eliminating doubt as to his guilt. Although remoteness in time is a factor, "[n]o specific time limits have been established for determining when an . . . offense is so remote as to be inadmissible. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [30-year-old prior sexual offenses not remote]; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [23-year-old rape conviction not remote].) Here, remoteness of time was balanced by other factors.

As a further indication of the care with which the trial court addressed the issue, the court carefully examined each incident, parsed the facts, and excluded two of the five instances of prior sexual misconduct because they were either insufficiently similar to the instant case or because it would be unfair to make defendant defend himself against allegations that had not been fully litigated and had happened many years earlier. The court discussed the reasoning behind its decisions, and exhibited an awareness and concern for the potential prejudicial impact that admission of the prior incidents would have.

The trial court thoroughly instructed the jury on the proper use of evidence of prior sexual offenses, explaining that prior offence evidence was not sufficient to convict absent other evidence, and only one factor among many to be considered. (CALJIC No. 2.50.01.) It admonished the jury that although it could conclude defendant had the

propensity to commit sexual offenses from this evidence, the evidence could not be used for any other purpose. (*Id*.) The jury was instructed that defendant was presumed innocent, and that it must be persuaded of defendant's guilt beyond a reasonable doubt to convict him. (CALJIC Nos. 2.50.01, 2.50.1 & 2.90.)

The record establishes the trial court carefully made a reasoned decision. Defendant has failed to establish that the court acted arbitrarily or beyond the bounds of reason. Defendant's constitutional rights were not violated by admission of the evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [""""[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense""""].)

Unauthorized Invasion of Privacy

Defendant contends that insufficient evidence supports his conviction for unauthorized invasion of privacy. Although he admits to photographing Jane naked without her permission, he argues that the cell phone with which he took the pictures was not concealed, and that he did not photograph Jane secretly. We disagree.

In assessing a claim of insufficiency of evidence, the appellate court's task is to review "the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Where substantial evidence supports the jury's finding, and other circumstances support a

contrary finding, the jury's finding will not be reversed. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

Section 647, subdivision (j)(3)(A), criminalizes the use of "a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person."

Undoubtedly, the most common form of concealment of a camera from a victim is its physical placement in a surreptitious location. But there is nothing in the plain language of the statute that requires this type of physical concealment. A defendant who creates or takes advantage of circumstances in which a person is rendered incapable of knowing of a recording device's existence also may, depending on the situation, conceal the existence of the camera from the victim. In both situations, the victim is unaware of the presence of a camera, and she has no means to protect herself or protest the unwanted taking of her photograph in a state of undress.

We are satisfied that, under the circumstances of this case, substantial evidence supports the jury's finding that defendant effectively concealed a cell phone camera from Jane in order to take nude photos of her as she lay physically incapacitated and unaware of what was taking place. Jane testified that she had drinks with defendant at the bar, but she did not remember leaving the bar or anything about how she ended up nude in the bathtub at defendant's residence. The bartender did not believe Jane was intoxicated. Although there is no direct evidence Jane was drugged, she told the SART nurse she believed defendant may have given her a date-rape drug, and her condition certainly suggests that is what occurred. Jane's level of incapacitation was verified by defendant's testimony that his motivation for taking the photos was to convince Jane that she needed

help. Based on this evidence, the jury could conclude defendant created a scenario in which the presence of his cell phone for the purpose of taking nude photos was concealed from Jane.

The balance of the evidence supports this view of the evidence. Jane was nude in the tub, physically unable to move with her eyes closed, when she heard the clicking of the cell phone camera. In her condition, Jane was incapable of being aware of the phone's presence or its use as a camera before the photos were taken. Defendant did not mention the phone to her, tell her he was going to take pictures, or show her the pictures he had taken. He never asked Jane's permission to take the pictures. When interviewed by the police defendant did not mention that he took the photos, and in fact, he deleted them from his cell phone, conduct reflecting a consciousness of guilt that he had photographed Jane with a cell phone that had been concealed from her view. Defendant attempted to destroy evidence of the photos because he knew they corroborated Jane's complaint. Given the totality of the circumstances, the record contains substantial evidence of concealment.

HIV/AIDS Testing

At sentencing, the trial court ordered defendant to submit to HIV/AIDS testing pursuant to section 1202.1, without objection. On appeal, defendant contends that there is insufficient evidence to establish probable cause that he transferred a bodily fluid capable of transmitting HIV to Jane.

Section 1202.1, subdivision (a), requires the trial court to order designated persons "to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction." Among those designated are persons convicted of sexual penetration in violation of section 289, "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]" (§ 1202.1, subd. (e)(6)(A).)

The statute directs a court ordering such testing to "note its finding on the court docket and minute order if one is prepared." (*Id*., subd. (e)(6)(B).)

"Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. [Citations.] Under the substantial evidence rule, a reviewing court will defer to a trial court's factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found. [Citations.]" (*People v. Butler* (2003) 31 Cal.4th 1119, 1127.) Where, as here, the trial court did not specifically articulate its reasons for the HIV/AIDS testing order, we presume an implied finding of probable cause. (*Ibid*.)

Our review of the record leads us to conclude that the evidence is sufficient to cause a person of ordinary care and prudence to entertain an honest and strong belief that defendant transferred blood, semen, or some other bodily fluid capable of transmitting HIV to Jane. There was a significant period of time of which Jane had no memory. When she awoke, she was lying on her back completely naked and wet in defendant's bathtub. Defendant, an acquaintance with whom she was not intimate, was standing over her wearing nothing but a shirt. His penis was exposed and erect. Jane could not remember entering the apartment and did not know how her clothes were removed. Several hours after she fled defendant's apartment, she reported pain and soreness in her genital area while undergoing a sexual assault examination. A swab taken from her vulvar area contained DNA for which defendant was a possible contributor. The chances of matching the particular male DNA profile taken from Jane were one in 1.2 quintillion. The evidence is sufficient to establish probable cause.

We are not persuaded otherwise by defendant's argument that there is insufficient evidence that he transmitted a bodily fluid capable of transferring HIV/AIDS because Senior Criminalist Anderson did not detect the presence of semen in any of the swab samples taken from Jane's body. Anderson could not identify or rule out which type of

bodily fluid had been the source of the DNA. Moreover, in a case that did not involve DNA evidence or evidence of semen, Division Three of this court held that the evidence supported an order for HIV/AIDS testing where the defendant was found guilty of committing a lewd act on a child that involved attempted penile penetration. (*People v. Caird* (1998) 63 Cal.App.4th 578.) The absence of semen is not dispositive.

The trial court did not err in ordering that defendant be subjected to HIV/AIDS testing.

Cumulative Error

Finally, defendant contends that cumulative errors at trial deprived him of due process. As we have concluded that the trial court did not err, the contention necessarily fails. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

I concur:

TURNER, P.J.

RAPHAEL, J., concurring and dissenting.*

The People v. Steven Desisto

B262564

I join the majority opinion in affirming defendant's felony convictions and the order requiring him to submit to HIV/AIDS testing. I respectfully dissent from the portion of the opinion affirming defendant's misdemeanor conviction on count five for disorderly conduct in violation of Penal Code section 647, subdivision (j)(3)(A).

Section 647, subdivision (j)(3)(A), criminalizes using "a concealed. . . camera of any type" to take photographs of unclothed or partially clothed persons in certain circumstances. As the majority states, when the victim was in defendant's bathtub, "[s]he heard a clicking sound that sounded like a cell phone taking pictures. When she opened her eyes, she saw defendant pointing a cell phone at her." In my view, a defendant does not use a "concealed" camera under section 647, subdivision (j)(3)(A), when he uses a camera openly, rather than by hiding or disguising it, even he takes (or in this case attempts to take) the photograph secretly. I write to explain my view that there is insufficient evidence of a "concealed . . . camera" to sustain the misdemeanor conviction here.

The Misdemeanor Statute at Issue

Although the prosecution has litigated this case referring to the section 647, subdivision (j)(3)(A), charge as "unauthorized invasion of privacy," the crime is actually defined as misdemeanor disorderly conduct in the Penal Code. Subdivisions of section 647 criminalize a diverse set of activities (including prostitution, loitering, and other behavior), any of which constitute disorderly conduct. Defendant was convicted of

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

violating section 647(j)(3)(A), which criminalizes certain photo-taking using a "concealed . . . camera of any type":

"Any person who uses *a concealed camcorder, motion picture camera, or photographic camera of any type*, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person." (§ 647, subd. (j)(3)(A), italics added.)

In the italicized portion of the statute, the word "concealed" is an adjective that describes the device at issue, whether a camcorder or some other camera. For ease of reference, I will refer to this phrase as the "concealed camera" language or requirement.

Section 647, subdivision (j)(3)(A), is one of three subdivisions of Penal Code section 647 that are sometimes referred to as California's "Peeping Tom" statute and that address particular invasions of privacy. (See *People v. Hobbs* (2007) 152 Cal.App.4th 1, 8; David D. Kremenetsky, *Insatiable "Up-Skirt" Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places* (2000) 31 McGeorge L.Rev. 285, 289).[1] Those three subdivisions of section 647, along with a brief description of their subject and their date of enactment, are subdivision (i) (peeking in doors and windows; 1961); subdivision (j)(2) (upskirt photography; 1999); and subdivision (j)(3)(A) (concealed camera photography; 2004). A related fourth crime, criminalizing the distribution of certain private photography (sometimes informally referred to as "revenge porn") was enacted in 2014 as section 647, subdivision (j)(4)(A). Rather than enact a general invasion of privacy statute, the Legislature has targeted each provision at particular

[1] Prior to January 1, 2008, subdivisions (j)(2) and (j)(3) were codified as subdivisions (k)(1) and (k)(2), but for clarity I use only the current statutory citations.

conduct, with the most recent three crimes prompted by concerns about the use of technology that had not been widely available a generation earlier.

The Ordinary Meaning of the Concealed Camera Requirement

Courts start with the ordinary meaning of statutory language in determining the meaning of a statute. "'Our role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning.' [Citation.]" (*People v. Wright* (2006) 40 Cal.4th 81, 92.) Additionally, "a criminal statute must give fair warning of the conduct that it makes a crime . . . ." (*Bouie v. Columbia* (1964) 378 U.S. 347, 350; see *People v. Castenada* (2000) 23 Cal.4th 743, 751 [fair warning protection embodied in due process clauses of both the federal and California Constitutions].)

In my view, the ordinary meaning of section 647, subdivision (j)(3)(A), requires that a perpetrator use a camera that is itself concealed. When the word "concealed" is used to modify an object, it ordinarily means that the object is physically hidden or disguised from view. (See *People v. Hill* (1997) 58 Cal.App.4th 1078, 1090 ["The word 'conceal' simply means to hide or cover something from view"]; *People v. McGinnis* (1942) 55 Cal.App.2d 931, 936 ["The common definition of the word 'conceal' is 'to hide or withdraw from observation; to cover or keep from sight'"].)

Any ordinary use of the word "concealed" to modify an object—such as a microphone, door, panel, or compartment—reflects this meaning: the object is physically hidden or disguised. If a theater has "concealed speakers," for instance, that ordinarily means the speakers are physically concealed so a patron cannot readily see them (hidden) or can see them but cannot readily identify them as speakers (disguised). It is true that there is an alternative meaning of "conceal"—i.e., preventing something from being discovered—that might encompass actions other than hiding a physical object, such as

acts of deception or misdirection. (See *People v. Eddington* (1962) 201 Cal.App.2d 574, 577 ["The word 'conceal' is defined by Webster's New International Dictionary, 2d edition: 'To hide or withdraw from observation; to cover or keep from sight; *to prevent the discovery of*'"] [italics added].) But this alternative meaning is ordinarily used where a person acts to conceal something intangible—such as an offense, a fraud, an identity or an agenda. A criminal might "conceal assets" by electronic transactions that launder them through a series of bank accounts rather than by physically secreting something in a drawer. But a police officer who finds "a concealed $100 bill," has found something physically hidden. When a physical object is described with the adjective "concealed," the ordinary meaning is that the object is physically hidden or disguised.

Consistent with this view, when courts construe statutes criminalizing the carrying of a concealed weapon, they analyze whether the item is physically hidden from an objective observer. (*United States v. Flum* (8th Cir. 1975) 518 F.2d 39, 45 ["The classic definition of a concealed weapon is one which is hidden from ordinary observation"].) This inquiry does not depend on a police officer's subjective ability to spot the weapon, but on whether the weapon is sufficiently physically hidden. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 ["Whether or not a trained officer can recognize a gun case from outside a car, if the driver is carrying a gun inside that case so that the gun cannot be seen from outside the car the gun is plainly 'concealed'"]); *People v. May* (1973) 33 Cal.App.3d 888, 891 [weapon was concealed even though, when standing immediately behind the defendant, the officer was able to see it in the defendant's pocket]; *United States v. Robson* (D. Md. 2005) 391 F.Supp.2d 383, 391 ["a weapon is concealed if it is so situated as not to be discernible by ordinary observation by those near enough to see it if it were not concealed who would come into contact with the possessor in the usual associations of life"].)

Because of the ordinary use of the adjective "concealed" when it modifies an object, I read the concealed camera requirement in section 647, subdivision (j)(3)(A), as requiring that the prosecution prove that the defendant used a camera that was physically hidden or disguised in some manner. (Cf., e.g., CALCRIM Nos. 2501, 2520, 2521, and

2522 [instructions for various concealed weapon offenses, each of which requires a jury to find that a weapon was "substantially concealed"].)

In addition, the full text of section 647, subdivision (j)(3)(A), requires that the defendant use a camera that has itself been concealed, rather than merely act to conceal the photo-taking itself. The statute requires that a defendant act "secretly" in photographing or video-recording the subject. Any time a defendant acts secretly in using a camera, the *taking* of the photograph will be concealed by the defendant (or, at least, the defendant will have attempted to conceal that taking). If the concealed camera language is read to impose nothing additional beyond the secret taking of the photo, then that language is rendered superfluous. (*People v. Craft* (1986) 41 Cal.3d 554, 560 ["a statute should not be given a construction that results in rendering one of its provisions nugatory"].) A person who tiptoes into her roommate's bedroom and photographs him sleeping partially clad would have "secretly" photographed her subject, but, in my view, she could not be prosecuted under section 647, subdivision (j)(3)(A), because she did not conceal a camera.[2] A contrary view that she *is* guilty of violating the statute must rely upon her acting secretly to conceal the *taking* of the photograph as sufficient to conceal the camera. This view gives no independent effect to the concealed camera language. Consequently, it seems to me that reading the statute to require that a camera must be physically hidden or disguised not only applies the ordinary meaning of the concealed camera language, but the alternative construction of the text is unsatisfactory because it renders that language nugatory.

While I agree with the majority that defendant invaded his victim's privacy when he used his cell phone camera to photograph her while she lay naked and semiconscious, that conduct did not violate section 647, subdivision (j)(3)(A). There may well be an invasion of privacy when a person takes *any* unconsented secret photograph of an unclothed subject in circumstances where the subject has a reasonable expectation of

[2] The same analysis would apply to the taking from a distance of a photograph of a celebrity in swimwear: in my view, that might well be done secretly, but the statute has not rendered it criminal because the camera itself is not concealed.

privacy. But the Legislature did not draft section 647, subdivision (j)(3)(A), to criminalize all such photographs; it expressly targeted those taken using a concealed camera. In this case, the camera was not in fact concealed from the victim, who heard a clicking noise that sounded like a cell phone camera and saw defendant pointing his phone at her. But whether the subject of photos is conscious, semi-conscious, or unconscious, the statute requires that the camera itself be concealed for this misdemeanor to be committed. I therefore conclude that there was insufficient evidence to support the misdemeanor conviction here, though I concur in the affirmance of defendant's felonies for his sexual conduct.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.