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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MUHAMMAD HAKIM SAYYID-EL, Defendant and Appellant.	2d Crim. No. B235608 (Super. Ct. No. 1299936) (Santa Barbara County)

Muhammad Hakim Sayyid-El appeals a judgment following his conviction of committing an attempted lewd act upon a child (Pen. Code, §§ 664, 288, subd. (a)) and annoying or molesting a child (*id.*, § 647.6, subd. (a)). We conclude, among other things, that the trial court did not abuse its discretion by admitting evidence that Sayyid-El was wearing women's undergarments when he committed the offenses. We affirm.

FACTS

On September 21, 2009, a man matching Sayyid-El's description went into a video shop on Mission Street. He went to the adult section of the store and took photographs of DVD "boxes," which contained pictures of people engaging in "sex acts." The store manager asked him to leave after he had an altercation with another customer.

I.J., a 13-year-old girl, was walking down Mission Street. Sayyid -El approached her, tried to shake her hand, and said, "Hey, babe. How's it going?"

I.J. was "startled," she "backed up." Sayyid-El asked her "to go behind the building and touch his penis." He said if "[she] did that, . . . he would . . . return the favor."

I.J. "started backing up as he came closer to [her]." He stepped "forward," "lunged" at her, and tried to "grab" her arms. He "brushed up against one of [her] shoulders." She "slipped past him" and ran down the street.

I.J. told her father what happened. He called 911. The police arrived "[t]hree to five minutes" after the incident. I.J. got into a police car. The officer drove her to the place where Sayyid-El was standing. She positively identified him. Sayyid-El was arrested, and in a search "incident to arrest," a police officer found "two pairs of girl panties" in his "pant pocket." When he was booked in jail, he was wearing a women's bra and panties under his clothes.

Before trial, defense counsel requested the trial court to exclude the evidence of the bra and panties he was wearing. The trial court initially ruled it was inadmissible. At a subsequent Evidence Code section 409 hearing, a prosecution expert testified about the sexual significance of men wearing women's clothing.[1] The court ruled the evidence about the bra and panties was admissible, "highly probative" and not "unduly prejudicial."

At trial, I.J., then 15 years of age, testified about the Mission Street incident.

Dr. Paul Abramson, a UCLA professor of psychology, testified that men who wear bras and panties under their male clothing do so "to facilitate sexual arousal."

The prosecution presented evidence of Sayyid-El's prior sexual offenses.

A.T. testified that Sayyid-El was her uncle. In 1987, when she was five

[1] All statutory references are to the Evidence Code.

years old, he "molested" her. She said when she was lying in bed, she "could feel his penis being grazed across [her] buttocks."

C.H. testified that in 1998 she was at a phone booth. Sayyid-El came over, made a "sexual" remark, grabbed her hand and "pulled it to his crouch." He smiled and said "something about his" penis. She told him, "I'm calling the police." Sayyid-El "grabbed [her] breasts real tight." She "shoved him off" and contacted the police.

DISCUSSION

Admission of Evidence about the Women's Undergarments

Sayyid-El claims the trial court erred by admitting evidence that he wore women's undergarments because this was "[p]rohibited [c]haracter [e]vidence" under section 1101. (Underscoring omitted.)

The People claim Sayyid-El forfeited this issue by not raising a section 1101 objection in the trial court. We agree.

At the section 402 hearing, defense counsel objected to admission of "the undergarments" on section 352 grounds. He did not raise a section 1101 objection. That forfeits this issue on appeal. (*People v. Abel* (2012) 53 Cal.4th 891, 928-929; *People v. Doolin* (2009) 45 Cal.4th 390, 448.) But even on the merits, the result does not change.

"We do not disturb the trial court's exercise of discretion in admitting evidence 'unless there is a manifest abuse of that discretion resulting in a miscarriage of justice.'" (*People v. Harlan* (1990) 222 Cal.App.3d 439, 446.)

Section 1101, subdivision (a) provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

But section 1101, subdivision (b) provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or

other act when relevant to prove some fact (such as . . . intent . . .)." "Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.)

The People claim evidence of the defendant's sexual intent is a necessary element to prove an attempt to commit a lewd act on a child. We agree. "An attempt to commit a lewd act upon a child requires both an intent to arouse, appeal to, or gratify 'the lust, passions, or sexual desires of [the defendant] or the child' [citations] ‘and . . . a direct if possibly ineffectual step toward that goal-in other words, he attempted to violate section 288.'" (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1322.)

Sayyid-El claims the trial court erred by finding that the evidence that he wore women's undergarments was relevant to his sexual intent. We disagree.

'"The trial court has considerable discretion in determining the relevance of evidence.'" (*People v. Clark* (2011) 52 Cal.4th 856, 922.) Sayyid-El was wearing a bra and panties when he committed the offense. The trial court could reasonably find these items were connected to his commission of the crime. Dr. Abramson testified that men who wear bras and panties under their male clothing do so "to facilitate sexual arousal." He said it is "the most common form of a male fetish." That testimony, the women's underwear, and Sayyid-El’s activities prior to committing the offense constituted strong evidence of a sexual intent for the crime. (*People v. Crabtree*, *supra*, 169 Cal.App.4th at p. 1322.)

Sayyid-El suggests his female undergarments were unrelated to the intent element for an attempted lewd act on a child. But a similar contention was rejected in a case involving that same offense. (*People v. Crabtree*, *supra*, 169 Cal.App.4th at p. 1322.) There the Court of Appeal decided that items such as Viagra, condoms, and a bikini, in combination with other evidence, showed "appellant's intent to carry out his intended lewd act upon [the child victim]." (*Ibid.*) Here, from Abramson's testimony, a

trier of fact could reasonably find that the female underwear facilitated the sexual arousal that led to the crime and constituted the requisite intent for the offense.

Section 352

Sayyid-El contends the evidence should have been excluded under section 352 because its probative value was substantially outweighed by its prejudicial impact.

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) It is "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*Ibid.*)

Sayyid-El claims the evidence that he wore women's underwear was so inflammatory and created such a bias against him that it compromised his right to a fair trial. The People respond that it was not unduly prejudicial given the nature of the crimes and the probative value of the evidence. They cite *People v. Harlan*, *supra*, 222 Cal.App.3d at pp. 445-446.

In *Harlan*, the defense objected to the admission of evidence that the defendant "wore women's underwear" on the ground that it was "more prejudicial than probative." (*People v. Harlan, supra*, 222 Cal.App.3d at pp. 444-445.) The defendant in that case was charged with committing a lewd act upon a child. The trial court overruled the objection. It found the evidence was relevant to the issue of identity and it told defense counsel, "'I think in today's society that cross-dressing is not so unusual as to have the devastating effect that you fear.'" (*Harlan*, at p. 445.) The Court of Appeal held there was no abuse of discretion. It said the evidence was relevant to corroborate a witness and "[a]lthough Harlan's behavior was unusual, it was not 'devastating.'" (*Id.* at p. 446.)

Here Abramson testified wearing such undergarments is "the most common form of a male fetish." The probative value of this evidence was high because it showed Sayyid-El's intent and motive for committing the offense. Because motive is

usually "the incentive for criminal behavior," its probative value generally exceeds its prejudicial effect. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

Sayyid-El claims the evidence was prejudicial because the prosecution used it to bolster a case it could prove with other evidence. But "[e]vidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 438.)

The People claim that the nature of this evidence was not comparatively offensive to jurors given the egregious nature of the evidence about his offenses. We agree. The relatively innocuous evidence about the clothing "paled in comparison to the testimony" of the witnesses who testified against him regarding his sexual offenses. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 439.)

But even had the trial court erred, Sayyid-El has not shown any reasonable likelihood of a different result had this evidence been excluded. The prosecution's case was strong. Sayyid-El requested I.J. to commit sexual acts. I.J.'s testimony was not contradicted. It was supported by the testimony of her father who said she would never lie about a serious matter. Sayyid-El had girl's panties in his pocket when he was arrested, and his actions that day before he confronted I.J. showed a sexual intent and motive. The People presented compelling and highly incriminating evidence about the prior sexual offenses he committed against A.T. and C.H.

The People also introduced incriminating statements Sayyid-El made about the Mission Street incident. In a February 19, 2010, phone call to his sister, Sayyid-El said, "I might have made an inappropriate comment cause this bitch had on some booty shorts, bumpin' that ass lookin' good and all that." In a subsequent call, his sister complained that he was trying to convince her to submit a false affidavit or letter on his behalf. Later, after learning the prosecution would be calling A.T. as a witness, Sayyid-El told his sister, "[M]ake sure somebody tell her don't say nothing that's going

to damage me in that court." These statements were evidence of his consciousness of guilt. Sayyid-El did not testify and he called no witnesses.

We have reviewed Sayyid-El's remaining contentions and we conclude he has not shown error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

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