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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ROMELL CROPPER, Defendant and Appellant.	2d Crim. No. B279926 (Super. Ct. No. MA068321) (Los Angeles County)

Michael Romell Cropper appeals his conviction, by jury, of one count of indecent exposure. (Penal Code, § 314, subd. (1).)[1] The trial court sentenced appellant to a total of four years in state prison. He contends there is no substantial evidence that he exposed himself "willfully and lewdly[,]" (§ 314, subd. (1)), and that the trial court erred when admitted evidence of his prior conviction for the same offense. He further contends the trial

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

court abused its discretion when it denied his motion for a continuance so that trial counsel could obtain a transcript of the trial on his prior offense and when it declined to instruct the jury that the prosecution failed to provide the transcript to appellant. We affirm.

Facts

Present Offense. At about 1:30 p.m. on Monday, January 18, 2016, Taisha Allen and her husband drove down 20th Street East in Lancaster, California. It was the Martin Luther King, Jr. holiday, so the traffic was light and there were few pedestrians on the street. Allen noticed appellant sitting on a bench at a bus stop. He had basketball shorts pulled down around his ankles and was wearing a white t-shirt and a beanie. His penis was exposed. Appellant's knees and feet were apart, his pelvis was tilted forward and his elbows were bent. She did not see appellant touch, point to or otherwise attract attention to his penis. Appellant did not look up, or look at Allen while she was waiting for the police to arrive.

After Allen called police, she and her husband drove around the block and past appellant twice. Appellant's penis was exposed for 12 to 15 minutes. The Allens eventually pulled over about a half block away from appellant and saw him putting on a pair of jeans.

When Los Angeles County Sheriff's Deputy Fisk arrived in response to Allen's call, appellant had his shorts pulled up around his waist and his jeans around his ankles. As the patrol car approached, appellant stood up and pulled his jeans up to his waist. The deputy asked appellant if he had been nude from the waist down. Appellant said no.

While Deputy Fisk was talking with the Allens, appellant ran down 20th Street East, into a neighborhood and jumped over a wall. Another deputy sheriff found appellant a few minutes later, hiding in some bushes.

Prior Offense. On a Monday afternoon in February 2014, appellant stood naked on a dry fountain in a public park in Fullerton, California. Fullerton Police Officer Robert Kirk, the arresting officer in that case, testified that he saw appellant "standing on top of the fountain completely nude with his hands above his head turning in circles and moving his hips side to side bouncing his penis off his thighs." When appellant noticed the police had arrived, he got down from the fountain and ran into some nearby trees where he put on some clothes. Appellant told Officer Kirk that he had done nothing wrong, that he believed in "God's laws," not "man's laws," and that, "God says to be naked under the sun." According to Kirk, appellant's penis was not erect during the incident. The officer did not observe anything "overtly sexual at that moment" in appellant's behavior. Appellant was convicted of indecent exposure as a result of this incident.

Contentions

Appellant contends there is no substantial evidence he exposed himself with the required lewd or sexual intent. He further contends the trial court prejudicially erred when it admitted evidence of his prior indecent exposure conviction. Appellant contends the jury should not have heard factual details of the prior offense because he had already stipulated to it. He contends Officer Kirk's testimony was more prejudicial than probative. Kirk was permitted to testify before defense counsel obtained the transcript of his testimony from the prior trial.

Appellant contends the trial court abused its discretion when it denied the defense request for a continuance to obtain the transcript and when it failed to instruct the jury that the prosecution did not provide the transcript to the defense.

Discussion

Substantial Evidence

In determining whether a conviction is supported by substantial evidence, "'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine '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.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Section 314 provides, "Every person who willfully and lewdly, either: [¶] 1. Exposes 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 . . . [¶] . . . is guilty of a misdemeanor. . . . [¶] [¶] Upon the second and each subsequent conviction under subdivision 1 of this section . . . every person so convicted is guilty of a felony . . . ." (§ 314.) As our Supreme Court explained in *In re Smith* (1972) 7 Cal.3d 362, both willfulness and lewdness are essential elements of the offense defined in section 314. (*In re Smith*, *supra*, at pp. 364-365.) "Willful" implies a purpose or willingness to commit an

act, such as undressing. (*Id.* at p. 364.) "[A] person does not expose his private parts 'lewdly' within the meaning of section 314 unless his conduct is sexually motivated. Accordingly, a conviction of that offense requires proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront." (*Id.* at p. 366, fn. omitted.)

Lewdness also includes conduct "for the purposes of sexual . . . affront." (*In re Smith*, *supra*, 7 Cal.3d at p. 366.) In this context, "affront," means to offend. (*People v. Archer* (2002) 98 Cal.App.4th 402, 406.) Thus, a defendant who intentionally exposes himself to another "for the purpose of *sexually* insulting or offending the other person commits indecent exposure in violation of section 314." (*Ibid.*)

In *In re Smith*, *supra*, 7 Cal.3d 362, the defendant fell asleep while sunbathing nude on an isolated beach. The beach was being used by "relatively few people" when the defendant arrived. Police arrived "[s]ome hours later" when "several other persons were present on the beach." (*Id.* at p. 364.) The court concluded Smith's nude sunbathing did not violate the statute because he had only been sleeping on the beach. "Absent additional conduct intentionally directing attention to his genitals for sexual purposes, a person, as here, who simply sunbathes in the nude on an isolated beach does not 'lewdly' expose his private parts within the meaning of section 314." (*Id.* at p. 366.)

In re Dallas W. (2000) 85 Cal.App.4th 937, followed *Smith* to conclude that a 16-year-old boy "mooning" traffic had "acted without any sexual intent[.]" (*Id.* at p. 938.) As a

consequence, "the evidence [was] insufficient to support the finding of indecent exposure because there is no evidence that he bared his buttock 'lewdly.'" (*Id.* at p. 939.)

Appellant contends his conduct is similar to that at issue in *In re Smith* and *Dallas W.* because he did nothing overt to direct attention to his genitals. No one saw appellant masturbate, he was not visibly sexually aroused, and there was no evidence that he called out to passersby or gestured toward his crotch. Appellant concludes there is no substantial evidence he was behaving "lewdly." We disagree.

A reasonable jury could find that appellant willfully and lewdly exposed himself. He chose a bus stop that is located on a busy public street in a residential area. Appellant sat on the bench with his shorts pulled down to his ankles, his knees and feet spread apart, and his pelvis tilted forward. While there were few pedestrians in the area, traffic passed by the bus stop. Appellant did not react to the traffic by trying to cover himself. A reasonable juror could infer, based on this evidence, that appellant was sitting on the bench, not simply with the intent to sun bathe, but with the lewd intent to call the attention of others to his exposed genitals.

In re Smith and *Dallas W.* are distinguishable. Unlike the nude sunbather in *Smith*, appellant was not asleep nor did he locate himself in an isolated or remote area. To the contrary, he chose a bench on a well traveled street and sat in a posture designed to allow passersby to see his genitals. The juvenile offender in *Dallas W.* momentarily "flashed" his bottom toward passing motorists as he and his friends were walking down the street. Appellant, by contrast, left himself exposed for several minutes as traffic passed by the bus stop he was

occupying. Allen testified that she observed appellant exposing himself for 12 to 15 minutes. In contrast to the facts of *In re Smith* and *Dallas W.*, a reasonable juror could find that appellant did not expose himself inadvertently, unconsciously or momentarily, but instead acted with the lewd intent to draw attention to his private parts.

Prior Conviction

Appellant contends the trial court erred when it permitted Fullerton Police Officer Robert Kirk to testify concerning the facts of appellant's 2014 conviction of indecent exposure. Because appellant stipulated to his prior conviction, he contends evidence regarding the incident was irrelevant. Second, appellant contends Officer Kirk's testimony should have been excluded under Evidence Code section 352 because the facts of the prior conviction were more prejudicial than probative. Appellant further contends the trial court abused its discretion when it denied a continuance to allow the defense to obtain the transcript of Officer Kirk's testimony from the prior trial. Finally, appellant contends the trial court abused its discretion when it declined to instruct the jury that the prosecution failed to provide the transcript of Officer Kirk's prior testimony to the defense.

Forfeiture. Appellant did not raise in the trial court, and has therefore forfeited the contention that, because he stipulated to the prior conviction, all evidence of it should have been excluded. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1000.) Had it not been waived, we would reject the contention.

In *People v. Merkley* (1996) 51 Cal.App.4th 472, the defendant was charged with indecent exposure and had a prior conviction for the same offense. Although the parties stipulated

to the prior conviction, the trial court allowed the prosecution to introduce evidence of it at the defendant's jury trial. The court of appeal held the trial court erred because, "the prior conviction in a section 314 charge is a sentencing factor to be determined by the court and not an element of the indecent exposure offense." (*Id.* at p. 476.) The court also acknowledged, however, that it did not "intend to preclude the use of a properly admitted prior conviction for purposes of impeachment. We recognize that a felony conviction that necessarily involves moral turpitude may be used to impeach a defendant subject to the trial court's discretion under Evidence Code section 352. [Citation.]" (*Id.* at p. 477, fn. 2.)

People v. Merkley, *supra*, 51 Cal.App.4th 472, did not require the trial court here to exclude all evidence of appellant's prior conviction. The evidence was not admitted to enhance appellant's sentence. It was instead admitted, under Evidence Code section 1108, to demonstrate appellant's disposition to commit sexual offenses. There was no error.

Admissibility. Evidence Code section 1108 provides that, in a prosecution for a sex offense, evidence of the defendant's prior sex offenses is admissible to establish his or her propensity to commit those crimes, so long as the evidence is not inadmissible under Evidence Code section 352. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) There is "a strong presumption in favor of admitting sexual assault evidence under Evidence Code section 1108 to show propensity to commit charged crimes. [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 62.) Indecent exposure is a sexual offense within the meaning of Evidence Code section 1108. (§ 1108, subd. (d)(1)(A).)

The trial court has discretion to admit evidence of prior sex offenses unless the probative value of that evidence is "'substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) We will disturb the trial court's determination on the admissibility of such evidence only if it exercised its discretion "'"in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1286.)

The probative value of appellant's prior conviction was high because his conduct during that incident was similar to the charged offense. Both incidents occurred in public places, near busy streets and residential areas, during daylight hours. In both incidents, appellant drew attention to himself by sitting or standing in a clearly visible location with his penis exposed for several minutes, even though he did not masturbate or become visibly sexually aroused. For the same reasons, the evidence did not unduly prejudice appellant. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) The prior incident was relevant to prove appellant's lewd intent in the charged offense and was properly admitted for that purpose.

Denial of Continuance. Appellant contends the trial court abused its discretion when it denied his trial counsel's request for a continuance before Officer Kirk testified. Counsel requested the continuance so he could obtain the transcript of Kirk's testimony at his previous trial. Section 1054.5, subdivision (b) authorizes the trial court to grant a continuance as a remedy

for untimely discovery. The trial court denied the continuance, and permitted Officer Kirk to testify, because it concluded that "it is probably fair to surmise that there was not necessarily exculpatory testimony given by the officer in that matter," and it was a "reasonable presumption that the officer testified in conformity with his statements in his police report at trial.

Appellant did not object to Officer Kirk's testimony or request a continuance on the specific statutory grounds he now raises on appeal. Appellant objected to evidence of his prior conviction on grounds of hearsay, relevance, undue prejudice and due process. He later objected that the live testimony of Officer Kirk should be excluded under Evidence Code section 352. He did not object that the prosecution failed to comply with its disclosure obligations under section 1054.1, nor did he follow the statutory procedure to compel additional disclosure by the prosecutor. (§ 1054.5, subd. (b).) Appellant's contention is forfeited because appellant failed to make a timely objection or a timely motion to compel on that specific ground. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21.)

In any event, we reject the claim because the trial court did not abuse its discretion when it denied a continuance. (*People v. Jenkins, supra*, 22 Cal.4th at p. 951.) Both the prosecutor and defense counsel made diligent but unsuccessful efforts to obtain the transcript of Officer Kirk's testimony in the previous trial. Counsel succeeded, however, in locating both a court of appeal opinion from the prior appeal and the *Wende* brief filed in that matter by his counsel. These documents summarized Kirk's trial testimony in a way that was, as defense counsel described it, "more or less . . . consistent with" the police report Kirk drafted.

The trial court could reasonably infer from these documents that the transcript of Officer Kirk's prior testimony was unlikely to contain impeachment material for use by the defense on cross-examination. It also ordered the prosecutor to continue her efforts to obtain the transcript, and it ordered Officer Kirk subject to recall if those efforts necessitated additional testimony from him. The trial court denied the continuance only after it became convinced that the transcript could not be located in a timely manner and was unlikely to contain any new information favorable to the defense. We conclude the trial court did not act arbitrarily or capriciously when it denied the continuance. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

Jury Instruction. One remedy available to address discovery violations by the prosecution in a criminal case is for the trial court to "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).) Appellant contends the trial court erred when it declined to instruct the jury that Officer Kirk "has previously given testimony at a prior trial [and] that statement has not been provided to [the] defense." We conclude the trial court did not abuse its discretion. (*People v. Curl* (2009) 46 Cal.4th 339, 357.) As we have previously explained, the trial court acted within its sound discretion when it concluded that the prosecuting attorney had not violated her statutory discovery obligations. It also properly concluded that the transcript of Kirk's prior testimony was unlikely to yield any information favorable to the defense. Given these findings, there was no "failure or refusal to disclose" of which the jury should have been apprised.

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Shannon Knight, Judge

Superior Court County of Los Angeles

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