

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HOSEA MORGAN,

Defendant and Appellant.

A147072

(Solano County
Super. Ct. No. FCR293416)

MEMORANDUM OPINION¹

Hosea Morgan (appellant) appeals from an order placing him on felony probation after a jury convicted him of five felony counts arising from a fraudulent workers' compensation claim: insurance fraud in violation of Penal Code section 550, subdivision (b)(1), insurance fraud in violation of Insurance Code section 1871.4, subdivision (a)(1), grand theft of personal property in violation of Penal Code section 487, subdivision (a), presentation of a fraudulent claim in violation of Penal Code section 72, and perjury in violation of Penal Code section 118. He contends the judgment must be reversed because: (1) he was unfairly prejudiced by evidence that he suffered from erectile dysfunction because the jury had been shown a surveillance video in which he was

¹ We resolve this case by memorandum opinion pursuant to the California Standards of Judicial Administration, section 8.1. (See also *People v. Garcia* (2002) 97 Cal.App.4th 847, 853–855.)

physically affectionate with a woman who was not his wife; and (2) the court placed undue pressure on the jury to reach a verdict. We affirm.

I. BACKGROUND

Appellant worked at San Quentin State Prison as a correctional officer and correctional counselor. In 2009, he was placed on leave after he filed two claims with the State Compensation Insurance Fund (State Fund) for multiple disabling workplace injuries. State Fund paid a total of \$74,619.13 in workers' compensation benefits between July 29, 2009 and June 20, 2011. Appellant subsequently filed an application for disability retirement, which was denied.

Surveillance by investigators revealed that while on leave, appellant engaged in physical activities that were inconsistent with his claimed injuries, including basketball, theater, lifting appliances, and long walks. Appellant's primary physician, Dr. Gomez, would not have taken appellant off work if he had known he was able to play basketball.

In 2011, appellant was examined by Dr. Lessenger, a qualified medical evaluator. Dr. Lessenger authored a report opining that appellant suffered from joint disease and osteoarthritis that had occurred as a consequence of his employment. At trial, having been shown surveillance videos of appellant engaging in physical activities, Dr. Lessenger concluded appellant had not disclosed his true physical condition and should have returned to work during the period he was placed on disability leave. Had he known appellant's true physical abilities, Dr. Lessenger would have recommended that appellant continue working full duty with no restrictions.

Appellant's defense at trial was that his claims were legitimate and that although he engaged in the physical activities captured on the surveillance tapes, he was in pain when he did so.

II. DISCUSSION

A. *Evidence of Surveillance Tape and Appellant's Erectile Dysfunction*

Appellant argues that he suffered unfair prejudice based on the combined effect of two pieces of evidence: (1) a surveillance video that showed him walking down a pier kissing a woman who was not his wife; and (2) his unsuccessful attempt to recover

workers' compensation benefits for erectile dysfunction. Appellant argues, "The evidence of erectile dysfunction along with the showing of the video recording of [appellant] having an affectionate relationship with a woman who was not his wife had little, if any, probative value and was clearly prejudicial." We are not persuaded.

The prosecutor sought to introduce evidence that appellant walked about half a mile down the Vallejo pier, which contradicted his statements to investigators that his injuries limited his ability to walk. The defense objected because the video depicted appellant walking with a woman who was not his wife. The prosecutor responded that the woman in the tape would not be identified and pledged not to ask any questions regarding her relationship with appellant. Defense counsel objected to a portion of the video showing appellant and the woman kissing, and the tape was redacted to edit out a prolonged embrace between appellant and the woman.

Also over defense objection, the prosecution introduced evidence that appellant had unsuccessfully sought to obtain workers' compensation coverage for his erectile dysfunction, which was found to be unrelated to his employment. The evidence was offered under Evidence Code section 1101, subdivision (b), which allows evidence of an uncharged crime or act when relevant to prove a material fact other than criminal propensity, such as intent or the existence of a common plan or scheme. The prosecution reasoned that appellant's effort to obtain workers' compensation for an injury that was not work related was probative of his intent to defraud, and noted that appellant had told investigators "he tried to get workers' compensation to pay for Viagra but they would not." The court ruled that the claim was admissible for this purpose and gave a limiting instruction both at the time the evidence was introduced and as part of the instructions to the jury at the close of the case, which stated that evidence of claims by the defendant of erectile dysfunction were "not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence is received and may be considered by you only for the limited purpose of determining if it tends to show the existence of the specific intent to defraud and for no other purpose."

Both the surveillance tape and appellant's prior claim for erectile dysfunction were relevant because they had a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of this action." (Evid. Code, § 210.) The surveillance tape showed appellant's physical condition and directly contradicted statements he had made to investigators regarding his ability to walk. (See *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 442 [video of injured plaintiff highly probative of the extent of plaintiff's injuries].) Appellant's attempt to obtain workers' compensation benefits for erectile dysfunction when there was evidence it was in fact unrelated to his industrial injury tended to show that he was untruthful in making his other workers' compensation claims for which benefits were paid. "Where fraud is charged, evidence of other frauds or fraudulent representations of like character, committed by the same parties at or near the same time is admissible to prove intent." (*The Atkins Corporation v. Tourny* (1936) 6 Cal.2d 206, 215.)

Turning to appellant's claim that the evidence was more prejudicial than probative under Evidence Code section 352, " 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citations].' [Citation.] 'The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 (*Jablonski*).

Here, evidence of the surveillance video was not unduly prejudicial. The court redacted a section of the video showing a more prolonged embrace between appellant and the woman in the video; no mention was made of the woman's identity or of appellant's infidelity; and there is no reason the jury would have assumed the woman was not appellant's wife. As for appellant's claim of erectile dysfunction, if the jury were to find that appellant lied about this condition for the purpose of obtaining benefits, the evidence

would be highly probative of his intent to defraud. If, on the other hand, the jury determined appellant's efforts to obtain compensation for that condition had been made in good faith, there is nothing about the condition itself that would cause the jury to believe he was the type of person who would commit insurance fraud. The court gave an instruction limiting the use of the erectile dysfunction claim to the issue of intent, which we presume they followed. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 25–26.)

The trial court did not act in an arbitrary, capricious or patently absurd manner by admitting the redacted tape or the evidence of erectile dysfunction. There was no abuse of discretion. (*People v. Williams* (2008) 43 Cal.4th 584, 634–635.)

B. *Juror Coercion*

Appellant argues the trial court exerted undue pressure upon the jurors to reach a verdict by requiring them to resume deliberations after they advised the court they were deadlocked. The claim has been forfeited by defense counsel's failure to object. (*People v. Neuffer* (1994) 30 Cal.App.4th 244, 254.)² It also fails on the merits.

The jury retired to deliberate at 2:20 p.m. on Tuesday, September 22, 2015, and recessed at 4:00 p.m. They deliberated all day during the following two days, with much of that time being consumed by readbacks of requested testimony. On Friday, September 25, at 1:41 p.m., the jury sent a note to the court asking what to do if they could not reach a unanimous decision. The court brought the jurors into the courtroom to inquire about the nature of the split, and learned the votes had moved from seven to five to nine to three on the last count on which they had voted. After a discussion with counsel, the court

² We reject appellant's argument that the failure to object amounted to ineffective assistance of counsel. A claim of ineffective assistance of counsel must be rejected on direct appeal " "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' ' ' (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.) The record here sheds no light on counsel's reasons for failing to object to sending the jury back for further deliberations, but we can think of one: she might have believed appellant has a good chance of obtaining an acquittal if deliberations continued.

asked each of the jurors whether additional deliberations would be fruitful, and two of the twelve indicated they might be able to reach a verdict. The court directed the jury to continue with deliberations.

The court subsequently received a note from the jury asking a question about an exhibit that it could not answer. It polled the jury at the end of the day and the foreperson stated that further deliberations might result in a unanimous verdict. About half of the jurors agreed. The jury resumed deliberations on Monday, September 28, 2015, and reached a verdict that same day after a few more hours of deliberations.

Penal Code section 1140 provides, “[T]he jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.” The determination of whether there is a reasonable probability of agreement rests in the sound discretion of the trial court, but the court “must exercise its power . . . without coercion of the jury, so as to avoid displacing the jury’s independent judgment ‘in favor of considerations of compromise and expediency.’ ” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775 (*Rodriguez*).

“Coercion has been found where the trial court, by insisting on further deliberations, expressed an opinion that a verdict should be reached.” (*Rodriguez, supra*, 42 Cal.3d at p. 775.) On the other hand, directing further deliberations is proper when such direction “would be perceived ‘as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.’ ” (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

There was no jury coercion in this case. When first advised of the deadlock, the court inquired about the nature of the split without finding out how many jurors were for conviction and how many were for acquittal. (See *People v. Gill* (1997) 60 Cal.App.4th 743, 748.) The jury had at that time been deliberating for over two days, but much of that time had been consumed with the readback of testimony and the case involved several

counts. Two of the jurors thought it was possible further deliberations would result in a verdict, and by the end of that day, half of the jurors believed further deliberations would be fruitful. The court made no comments regarding the evidence and did not suggest the minority jurors should reconsider their views. While it gave the jurors the opportunity to reach a verdict, it never suggested they were obligated to reach a particular verdict or indeed, any verdict at all. The mere act of sending the jurors back for additional deliberations was not coercive, and the court did not abuse its discretion.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.

(A147072)