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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DREW KEVIN RUSSELL, Defendant and Appellant.	G033221 (Super. Ct. No. 02NF2028) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed in part, reversed in part and remanded.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and Warren P. Robinson, Deputy Attorneys General, for Plaintiff and Respondent.

Drew Kevin Russell was charged with indecent exposure and failing to register as a sex offender. (Pen. Code, §§ 314.1, 290.)[1] Following separate trials, he was convicted of both counts. He also admitted having suffered three prior strike convictions

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

and having served four prior prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b).) The trial court sentenced him to 25 years to life in prison, plus a concurrent term of 6 years. While we reject Russell's challenge to the sufficiency of the evidence, we agree with him that, in securing his conviction for failing to register, the prosecution relied on certain aspects of the registration statute that have been found to be unconstitutionally vague. We therefore reverse his conviction for failing to register and remand the matter for resentencing. In all other respects, we affirm the judgment.

* * *

On June 3, 2002, Christine Vu phoned Russell to tell him there was a stain on a pair of pants he had dropped off at her dry cleaning shop in Anaheim. When Russell returned to the shop later that day, Vu was alone. She acknowledged Russell and then turned around to get the stained trousers. While doing so, she noticed Russell's reflection on some type of glass or laminate. By means of this reflection, she saw Russell unzip his trousers and take out his erect penis.

Vu turned around and looked directly at Russell. When she saw his penis was still exposed, she ran behind the counter and considered calling the police. However, the phone was on the other side of the counter and Russell began walking toward her. Therefore, she stayed put and flagged down her friend Sody Chhum, who was outside. When Chhum entered the shop, Vu told her Russell had exposed himself to her. At first, Chhum could only see Russell's backside, but when he turned around and left the shop, she saw his hands were directly in front of him, down by his waist.

At trial, Russell denied any wrongdoing. He admitted getting into an argument with Vu about the stain on his pants, but claimed he kept his hands on the counter while he spoke to her.

While investigating the matter, the police learned Russell was a convicted sex offender who had been spending time in Anaheim. His girlfriend Shirley Holmes had an apartment there, and that is where the police found Russell 10 days after the dry

cleaning incident. Holmes told the police that Russell had been living with her since "around January," i.e., for about six months. When Russell disclosed he was not registered as a sex offender in Anaheim, the police arrested him for failing to register in that city.

During trial, the parties stipulated Russell had suffered prior convictions for which he was required to register as a sex offender. The evidence also established he was registered in Long Beach at the time he was arrested. Russell did not claim any address in Long Beach, but instead registered as a transient.

Holmes testified she began dating Russell in late 2001. She said he spent some nights in Long Beach and about two or three nights a week at her apartment. She also said she left a key under her front mat for him when she was not home. Her apartment manager testified she saw Russell come and go on various occasions. She had him fill out a resident application, but never had him sign a formal lease agreement.

I

Russell contends there is insufficient evidence to support his conviction for indecent exposure because Vu's testimony was inherently incredible. We disagree.

In reviewing the sufficiency of the evidence, we consider the record in the light most favorable to respondent and presume in support of the judgment everything the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not reweigh the evidence, resolve conflicts in the evidence, or evaluate the credibility of witnesses. (*Ibid*.) Except in "rare instances of demonstrable falsity," doubts about the credibility of in-court witnesses should be left for the fact finder's resolution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Russell claims this is one of those "rare instances" where the complaining witnesses' testimony was demonstrably false. He argues Vu's account of things must have been untrue because she said she saw his penis in a reflection and there was no evidence to corroborate her story. But Vu said that after initially noticing Russell's

reflection, she turned around and looked at him directly. She was quite clear in her testimony that she saw Russell's exposed penis from *both* vantage points. Furthermore, Chhum testified that when she entered the shop, Vu told her that Russell had exposed himself to her. Evidence of this prior consistent statement served to corroborate Vu's trial testimony. Taken as a whole, the evidence was more than sufficient to support Russell's conviction for indecent exposure. We have no reason to second-guess Vu's credibility.

II

Russell also challenges his conviction for failing to register as a sex offender. Particularly, he contends the prosecutor relied on certain aspects of the registration statute that have been found to be unconstitutionally vague. The Attorney General does not dispute the point that some parts of the statute are vague. However, he maintains Russell's conviction should be affirmed because it does not rest on any constitutional infirmities that exist within the statute.

The statute in question is section 290, which is designed to allow the police to keep tabs on sex offenders. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) To that end, subdivision (a)(1)(A) provides, "Every person [who has a prior conviction for a specified offense], for the rest of his or her life while residing in, or, if he or she has no residence, while located within California . . . shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located . . . within five working days of coming into, or changing his or her residence or location within, any city . . . in which he or she temporarily resides, or, if he or she has no residence, is located."

Subdivision (a)(1)(B) requires registrants who have "more than one residence address or location at which he or she regularly resides or is located" to register "in each of the jurisdictions in which he or she regularly resides or is located. If all of the addresses or locations are within the same jurisdiction, the person shall provide the

registering authority with all of the addresses or locations where he or she regularly resides or is located."

Subdivision (a)(1)(C) states, "If the person who is registering has no residence address, he or she shall update his registration no less than once every 60 days in addition to the requirement in subparagraph (A) . . . with the entity or entities described in subparagraph (A) in whose jurisdiction he or she is located at the time he or she is updating the registration."

Subdivision (g) sets forth the punishment for willful violations of the registration requirements. Any such violation is a felony if the offender is required to register based on a felony offense or if he has a prior conviction for failing to register. (§ 290, subd. (g)(2).)

In *People v. North* (2003) 112 Cal.App.4th 621, the court found the term "location" in section 290 fails to provide sufficient specificity as to when a transient sex offender is required to register in a particular jurisdiction. The court stated "the registration of every particular location at which an offender is regularly present is not feasible, and even in theory would lead to multiple and often meaningless registrations. A transient offender may occupy many locations on a more or less regular basis during the course of a day, week, or month. Section 290 provides no hint as to which locations the offender must provide to the police for purposes of facilitating surveillance." (*Id*. at p. 633.) The court therefore ruled that "the provisions governing changes of 'location' and registration at multiple 'locations' within a jurisdiction are unconstitutionally vague." (*Id*. at p. 624.)[2]

In *People v. Annin* (2004) 117 Cal.App.4th 591, the court distinguished *North* on factual grounds. Whereas *North* involved application of the terms "location"

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[2] The *North* court did not invalidate section 290 in its entirety, however. Construing the term "located" to mean present in a jurisdiction on five consecutive working days, the court found the basic registration requirements for transient sex offenders to be valid. Unfortunately, this saving judicial construction was no use to Russell because he was arrested and tried before *North* was decided.

and "located" to a transient sex offender who did not have an address, the defendant in *Annin* was convicted of failing to notify authorities when he moved from one address to another. Because his conviction did not "present any issue concerning the meaning of the terms 'location' or 'is located,'" the *Annin* court found no reason to disturb it. (*Id*. at p. 609.)

The Attorney General attempts to distinguish *North* on similar grounds. The way he sees it, Russell's "conviction was clearly based upon his acquiring either a primary or secondary residence at Shirley Holmes's apartment in Anaheim, rather than his simply being 'located' in Orange County without having a residence in that county. The decision in . . . *North* . . . therefore does not apply to" him. The record, however, does not support the Attorney General's position.

Russell was charged with violating section 290, subdivision (g)(2) for failing to register as a sex offender pursuant to subdivision (a) of that section. The evidence showed that at the time of his arrest, he was validly registered in Long Beach as a transient sex offender. Russell also spent time in Anaheim. When the police arrested him, his girlfriend said he had been living with her in Anaheim for the past six months. However, at trial she testified he only spent about two or three nights a week at her apartment.

In closing argument, the prosecutor's principal argument was that Russell was residing in Anaheim for purposes of the registration statute. But the prosecutor also relied on the theory that Russell was *located* in that city. Indeed, throughout his argument, he made several references to the terms "located" and "location." For example, he stated an element of the charged offense was, "The defendant came into or moved within a city in the State of California . . . and established a new temporary or permanent residence or a second temporary or permanent residence at which he regularly resides or is located or if homeless, a new temporary or permanent location." The

prosecutor then went on to say this element was satisfied if Russell was either residing in Anaheim *or merely located there* as a homeless person.

Despite this, the Attorney General maintains the prosecutor was simply "discussing various ways in which the registration law could theoretically be applied to" Russell. The Attorney General does not see this as problematical because the prosecutor "later made it clear that [the] case was based on a theory that [Russell] had established at least a temporarily-used secondary residence at Holmes's apartment, as opposed to some type of theory that [Russell] was merely 'located' in Anaheim as a homeless person without having established some type of residence in that city."

As a matter of fact, the prosecutor continued to blend the two theories of culpability in his argument. He said there are different ways to violate the registration statute, "We have the concept of residence; and we have the concept of location." Relying on the "dictionary definition" of these terms, he said a residence is "someplace where you live," whereas location refers to where you "hang out," such as a park or under a bridge. He said the registration statute was intended to be broad "because there are people who register . . . as transients or as people without homes" and those people "might try to make an end run around the purpose of [the] statute."

Continuing in this vein, the prosecutor said it didn't matter how long Russell had been staying with his girlfriend because "[y]ou must register where you're located. That is . . . why we have people register. [¶] If he's a homeless person . . . is he permanently located in Anaheim? In other words, does he spend all of his time in Anaheim or is he temporarily located in Anaheim? [¶] [He's] here for some of the time, but not all of the time. So it's a very, very broad statute that he needs to comply with." This is not the "theoretical" argument the Attorney General defends.

In his rebuttal argument, the prosecutor referred to a chart, which in his mind listed "the evidence of location or residence." Responding to defense counsel's contention the registration statute was vague and confusing, he said, "I don't think

anything I've said here today goes outside the bounds of what we commonly refer to as residence or location. [¶] Location is location. This is a location. This is a location. Location is where something is located. Residence is where somebody resides." Summing up his argument, he implored the jury to find Russell guilty for failing to register in Anaheim because "he was living there. That was his residence. That was his location."

Based on the foregoing, it is plainly evident the prosecutor relied on the concept of residency *and* the concept of location in securing Russell's conviction for failing to register. "[P]resenting a jury with a criminal case premised on an incorrect legal theory usually does require reversal." (*People v. Morales* (2001) 25 Cal.4th 34, 42.) Because the location concept has been found to be legally invalid on vagueness grounds (see *North, supra*), reversal is compelled unless the jury instructions clarified the issue or there is some basis in the record to find the jury actually based its judgment on the concept of residency. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130.)

As it turns out, the jury instructions echoed the prosecutor's argument. They stated the registration requirements are triggered when the registrant comes into, or moves within, a city and establishes a new residence, or, if the person is homeless, takes up a "new location," or if the person establishes a second "residence address or location at which he regularly resides or is located." And in rendering its verdict, the jury did not specify the basis on which it found Russell guilty. It simply found him guilty of violating section 290 for failing to register as a felony sex offender.

On this record, it is impossible to tell whether the jury convicted Russell on the theory he resided in Anaheim or on the theory he spent time at that location. Reversal is therefore required. In light of this conclusion, we need not address Russell's remaining arguments with respect to the failure to register count.

DISPOSITION

Russell's conviction for failing to register as a sex offender (count 1) is reversed. Because the trial court used that count as the base term for sentencing, the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.