

SEXUAL LAW REPORTER

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LEWD CONDUCT: PRACTICAL GUIDE TO EVIDENTIARY REQUIREMENTS

for Filing and Trial of Cases under Section 647(a) P.C.

as Interpreted by the California Supreme Court in

Pryor v. Municipal Court (1979) 25 C.3d 238, 158 Cal.Rptr. 330

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- A. The prosecution must prove 4 elements beyond a reasonable doubt.
1. The scope of the statute is limited to the type of conduct:
"which involves the touching of the genitals, buttocks, or female breast."
Pryor, supra, at 333.
 2. The defendant must have the specific intent to engage in such a touching:
"for purposes of sexual arousal, gratification, annoyance or offense."
Pryor, supra, at 333.
 3. The solicitation or commission of the conduct must be:
"in a public place or one open to the public or exposed to public view."
Pryor, supra, at 333.
 4. Even then, the conduct is "lewd" only if the defendant:
knew or should have known of the presence of persons who may be
offended by his act."
In re Anders (1979) 25 C.3d 414, 158 Cal.Rptr. 661; Pryor, supra, at 333.

NOTE: This construction is constitutionally required and was "derived from an analysis of the role of section 647, subdivision (a), in the structure of the California penal law."
Pryor, supra, at 339.

- B. The 4th element requires proof of certain sub-elements.
1. There must be proof of the presence of someone who may be offended:
"[E]ven if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended. The scope of section 647, subdivision (a), should be limited accordingly."
Pryor, supra, at 341 (majority opinion written by Justice Tobriner).

However, there is sufficient state interest and such sexual acts "are properly punishable when forced upon an unwilling and disapproving viewer."
Pettit v. State Board of Education (1973) 109 Cal.Rptr. 665, 673 (dissenting opinion by Justice Tobriner, joined in by Justice Mosk).

2. In order to establish the presence of persons who may be offended, two foundational facts must be shown:

(a) the actual presence of someone who may be offended:

"[T]he offensiveness of lewd acts committed in such a place . . . lies in the annoyance to or the possibility of annoyance to members of the public present on premises where such acts are committed." Steinke v. Municipal Court (1970) 82 Cal.Rptr. 789, 795; Pettit, supra, at 673.

CALJIC 16.400 (1980 Revision) defining the crime proscribed by section 647(a), is based upon the conclusion that "actual presence of a person who may be offended is required" See Use Note following that instruction.

(b) that such person was an onlooker to the sexual act:

"The statute . . . serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct." Pryor, supra, at 340.

The Random House Dictionary defines the word "onlooker" to mean "spectator." The word "spectator" is then defined as "a person who looks on; an observer; a person who is present at and views a spectacle, display or the like."

NOTE: See Section 403 Ev. C. as to the determination of foundational and other preliminary facts where relevancy is disputed.

3. Once it is established that an onlooker who might be offended was actually present at the scene and viewed defendant's conduct, it must then be shown that the defendant knew or should have known of this fact:

"The mental state element of knowledge of the actor is to be judged by the facts observable to a reasonable person at the time and place in question. Such facts are objective; that is, conduct or spoken words which are reasonably apparent to the actor."

People v. Vigner, Los Angeles Superior Court Appellate Department No. CR A 16400, Order Certifying Cause to the Court of Appeal, filed March 21, 1980.

COMMENT: Just as where evidence is susceptible of two reasonable interpretations, one interpretation pointing in the direction of guilt, and the other pointing in the direction of innocence, the trier of fact must adopt that interpretation pointing in the direction of innocence, so too the defendant is entitled to the benefit of every reasonable doubt as to the interpretation of words or construction of language used in a penal statute. Where such language is reasonably susceptible of two constructions, that which is more favorable to the defendant should be adopted. People v. Balentine (1946) 28 C.2d 121; People v. Smith (1955) 131 C.A.2d 889. This rule of law should dissipate any argument that "likely" and not "actual" presence of someone who may be offended is required.

END

SUMMARY OF EVIDENTIARY REQUIREMENTS
FOR LEWD CONDUCT CASES
AFTER *PRYOR v. MUNICIPAL COURT*

1. The primary purpose of this subdivision is to protect "onlookers who might be offended by the proscribed conduct."
 2. The proscribed conduct is limited to the solicitation or commission of conduct which conduct:
 - a) occurs in a public place or one open to the public or exposed to public view, and
 - b) involves the touching or the genitals, buttocks or female breast, and
 - c) is done with the specific intent to sexually arouse, gratify, annoy, or offend.
 3. Such conduct, however, is not criminal absent further proof:
 - a) of "the presence of persons who may be offended" ("may" is defined as expressing "possibility"; therefore, the persons present must be such that it is possible that they be offended, i.e., that they have the capacity to be offended by such conduct); and
 - b) that the persons present observed the proscribed conduct; and
 - c) that the defendant "knew or should have known" that there were onlookers present and that those onlookers might be offended by the conduct.
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