IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER E. PIGEON, AKA,
CHRISTOPHER EDWARD PIGEON.
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47210

FILED

OCT 17 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of open or gross lewdness. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Christopher E. Pigeon to serve a prison term of 19-48 months.

First, Pigeon contends that during rebuttal closing argument, the prosecutor improperly informed the jury that a guilty verdict could be returned based on a finding of facts less than those specifically charged in the criminal information. Pigeon argues that the State charged him "with lewdness by means of exposure plus masturbation," whereas the prosecutor argued that "evidence of something less than public masturbation" would be sufficient to find him guilty of open or gross lewdness. Pigeon concedes that defense counsel did not

contemporaneously object,[1] however, he claims that without providing him with notice by filing an amended criminal information, the State's changed theory of prosecution violated his due process right to a fair trial and amounted to plain error.[2] We disagree.

Pursuant to NRS 173.075(1), the charging document "must be a plain, concise and definite written statement of the essential facts constituting the offense charged." This court has stated that "[a] criminal defendant has a substantial and fundamental right to be informed of the charges against him so that he can prepare an adequate defense."[3]

In the instant case, the prosecutor's allegedly improper statements were hypothetical in nature and made in response to defense counsel's comment during closing arguments about what constitutes a violation under NRS 201.210. The State did not change its theory of prosecution during its rebuttal closing argument. As it was alleged in the criminal information, the prosecutor recounted how witnesses testified to seeing Pigeon masturbating behind a clothing rack in the young girls' department at a J.C. Penney's department store. The prosecutor also

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[1]See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration).

[2]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002).

[3]Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

reviewed the relevant instructions. Moreover, we note that the district court instructed the jury that it could only find Pigeon guilty if it was determined, beyond a reasonable doubt, that he "wilfully and unlawfully and feloniously commit[ted] an act of open or gross lewdness by exposing his penis and masturbating in the direct view and presence of [J.C. Penney employees]." Therefore, we conclude that Pigeon cannot demonstrate that the State improperly changed its theory of prosecution or that he was prejudiced in any way amounting to plain error.

Second, Pigeon contends that the district court erred by overruling his objection to the following jury instruction:

> The act of masturbation in public and in the presence of others constitutes the crime of Open and Gross Lewdness.

Pigeon claims that it was error to instruct the jury "that they must find a public act of masturbation to meet the elements of open or gross lewdness," and that such a mandate invades the province of the jury. We disagree and conclude that the district court did not abuse its discretion.[4]

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[4]Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005) (holding that "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error"); Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (holding that "[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason").

The instruction above is a correct statement of law and did not invade the province of the jury.[5]

Third, Pigeon contends that it was plain error for the district court not to have found, sua sponte, that the charging statute, NRS 201.210, was unconstitutionally vague. Pigeon claims that the statute does not provide fair notice of the conduct prohibited and lacks clear standards for law enforcement. We disagree.

"This court reviews the constitutionality of statutes de novo."[6] "A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that [his] conduct is forbidden by statute."[7] In addressing an offense that the Legislature has not expressly defined, we "look to the provisions of the common law relating to the definition of that offense."[8] In Young v. State, this court recognized that the common law definition of "open and gross lewdness" was the "'unlawful indulgence of

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[5]See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993).

[6]Sanders v. State, 119 Nev. 135, 138, 67 P.3d 323, 326 (2003).

[7]Williams v. State, 118 Nev. 536, 545-546, 50 P.3d 1116, 1122 (2002).

[8]Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983); see also NRS 193.050(3).

lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons lawfully present."[9]

We conclude that the offense of "open or gross lewdness" has a well-settled and ordinarily understood meaning and clearly encompasses Pigeon's conduct. Because Pigeon could have had no reasonable doubt that masturbating behind a clothing rack in the young girls' department at J.C. Penney's was "open or gross lewdness," his argument that the statute is unconstitutionally vague fails.

Therefore, having considered Pigeon's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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[9]109 Nev. at 215, 849 P.2d at 343 (quoting 3 Wharton's Criminal Law, § 315 (14th ed. 1980); 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 1 (1970)).

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk