IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DALE FOGERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50850

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Douglas W. Herndon, Judge.

The district court sentenced appellant Raymond Dale Fogerson to the Clark County Detention Center for 12 months with 211 days credit for time served.

On appeal, Fogerson raises the following assignments of error: (1) NRS 201.210 is unconstitutionally vague, (2) the district court erred in refusing to dismiss the information, and (3) there was insufficient evidence to support his conviction for the crime of open or gross lewdness.[1]

Constitutionality of NRS 201.210

First, Fogerson contends that NRS 201.210 is unconstitutionally vague because the term "open or gross lewdness" fails

[1]Fogerson also contends that the district court erred in: (1) refusing to give an instruction defining open or gross lewdness, (2) refusing to give a negatively phrased jury instruction, (3) refusing to give two reasonable interpretation instructions, and (4) instructing the jury that voluntary intoxication is no excuse to a crime committed under the influence. Having fully examined Fogerson's arguments regarding jury instructions, we conclude that they are without merit.

to provide fair notice of the prohibited conduct and creates the potential for arbitrary and discriminatory enforcement. We disagree.

The constitutionality of a statute is a question of law that this court reviews de novo. Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). The party challenging the statute has the burden of proving that the statute is unconstitutionally vague. Id. A statute is unconstitutionally vague if it "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement." City of Las Vegas v. Dist. Ct., 118 Nev. 859, 862, 59 P.3d 477, 480 (2002).

The term "'open or gross lewdness,' as set forth in NRS 201.210, has not been defined by the Nevada Legislature." Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983). Nevertheless, "when an offense has not been defined by the legislature, we normally look to the provisions of the common law relating to the definition of that offense." Id.

"At common law, open lewdness was defined as an 'unlawful indulgence of lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons lawfully present." Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (quoting 3 Wharton's Criminal Law, § 315 (14th ed. 1980); 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 1 (1970)). Absent from this common law definition, however, is the requirement that the indecency be made with the intent to offend. Rather, the common law requires that the indecency was intentional, as opposed to inadvertent or accidental. Id. Similarly, NRS 201.210 "does not require proof of intent to offend, . . . [i]t is sufficient that the public sexual conduct or exposure was intentional." Id.

Having reviewed the common law definition of the term "open or gross lewdness," we conclude that NRS 201.210 gave Fogerson fair notice of the prohibited conduct. We further conclude that NRS 201.210 provides officers sufficient guidelines upon which to base an arrest and, therefore, does not encourage arbitrary or discriminatory enforcement. Thus, NRS 201.210 is not unconstitutionally vague.

Moreover, in the instant case, Fogerson exposed himself to a twelve-year-old girl in a public park. Specifically, Fogerson was jiggling his genitalia with one hand while waiving at the young girl with his other hand. It is inconceivable that a person of ordinary intelligence would fail to recognize that such conduct was prohibited by NRS 201.210.

Adequacy of the information

Second, Fogerson contends that the district court erred in refusing to dismiss the information. This contention is essentially an extension of Fogerson's earlier argument that NRS 201.210 is unconstitutional.

At the close of evidence, Fogerson moved to dismiss the information, arguing that it failed to allege the element of intent to offend. The district court denied the motion, stating that the crime of open or gross lewdness is "not a specific intent crime [so] . . . you don't have to plead intentionally within the pleading to put the person on notice." The court further explained that "[t]he intent here is simply that[,] other than his pants falling down on accident, he intended to expose himself. Not that he intended to offend anyone, or [that] he intended to be obscene. He intended the act that was forbidden by law. So I think the pleading is sufficient."

We agree with the district court that the elements of the crime of open or gross lewdness do "not require proof of intent to offend." Young, 109 Nev. at 215, 849 P.2d at 343. Accordingly, we conclude that the district court did not err in denying Fogerson's motion to dismiss the information.

Sufficiency of the evidence

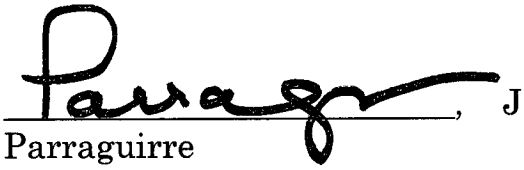
Third, Fogerson asserts that the evidence presented during trial was insufficient to show that his exposure was made with the intent to offend. "Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based." State v. Walker, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). In determining the sufficiency of the evidence, the critical question is "'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.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Contrary to Fogerson's assertions, the crime of open or gross lewdness "does not require proof of intent to offend an observer." Young, 109 Nev. at 215, 849 P.2d at 343. Rather, a conviction is sufficient if the evidence demonstrates that the indecency was intentional, as opposed to accidental. Id.

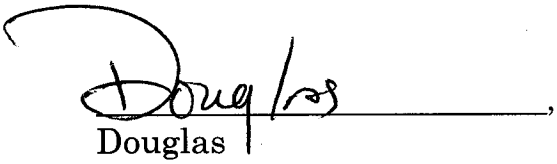
In this case, the testimony from the twelve-year-old girl demonstrates that Fogerson intentionally exposed himself in a public place. This conduct was punishable without regard to whether it was Fogerson's intent to offend an observer. Therefore, we conclude that the evidence was sufficient for a reasonable jury to conclude, beyond a

reasonable doubt, that Fogerson was guilty of the crime of open or gross lewdness. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk