IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH FOSTER JACKSON, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35924

FILED

APR 30 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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, five counts of sexual assault with the use of a deadly weapon, and three counts of sexual assault. The district court sentenced appellant to serve one year in jail on the open or gross lewdness count, two consecutive terms of 10 to 25 years in prison on each of the sexual assault with the use of a deadly weapon counts, and a term of 10 to 25 years in prison on each of the sexual assault counts. The district court further ordered that all of the sentences be served concurrently. Finally, the district court imposed a special sentence of lifetime supervision to commence upon appellant's release from any term of probation, parole or imprisonment.

Appellant first contends that NRS 201.210, which proscribes open or gross lewdness, is unconstitutionally vague because it does not clearly define the conduct that is prohibited. We disagree.

"It is settled that statutes are clothed with the presumption of validity and the burden is on those attacking them to show their unconstitutionality."[1] The Due Process

[1]Wilmeth v. State, 96 Nev. 403, 405, 610 P.2d 735, 737 (1980).

Clause of the Fourteenth Amendment to the United States Constitution prohibits states from holding an individual "'criminally responsible for conduct which he could not reasonably understand to be proscribed.'"[2] But the Due Process Clause does not require "impossible standards of specificity in penal statutes."[3] The relevant inquiry is whether "there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision."[4]

In this case, we must examine appellant's conduct to determine if this test is met, since vagueness must be judged in light of the conduct that is charged where, as here, the statute does not involve First Amendment freedoms.[5] The State charged appellant with open or gross lewdness for masturbating in the front passenger seat of a car parked on a public street.

The phrase "open or gross lewdness" is not defined in our statutes. However, the word "lewdness" has a commonly understood meaning and has been "variously defined as meaning lustful; given to unlawful indulgence of lust; or eager for sexual indulgence."[6] In fact, this court has previously considered a vagueness challenge to the word "lewd" as used in NRS 201.230, which proscribes lewdness with a child under the age of 14 years, and concluded that "[w]hile 'lewd' is not specifically defined in our statutes, the word '"conveys

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[2]Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harris, 347 U.S. 612, 617-18 (1954)).

[3]Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

[4]Id.

[5]United States v. Mazurie, 419 U.S. 544, 550 (1975).

[6]53 C.J.S. Lewdness § 2, at 3 (1987) (footnotes omitted).

sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."'"[7]

Moreover, in Young v. State,[8] we addressed the use of the word "open" to modify the word "lewdness". We explained that a conviction under NRS 201.210 "does not require proof of intent to offend an observer or even that the exposure was observed. It is sufficient that the public sexual conduct or exposure was intentional."[9]

Based on our decisions in Summers and Young, we conclude that the phrase "open or gross lewdness" has a well-settled and ordinarily understood meaning. Moreover, we conclude that that meaning clearly encompasses appellant's conduct. Since appellant could have had no reasonable doubt that his actions in masturbating in a vehicle parked on a public street were "open or gross lewdness," his argument that the statute is unconstitutionally vague fails.

Appellant next contends that the district court erred in denying his motion for a new trial based on conflicting evidence and juror misconduct and his alternative request for a judgment of acquittal based on insufficient evidence. We disagree for two reasons.

First, we conclude that the district court properly denied the motion because it was untimely. NRS 176.515(4) provides that a motion for a new trial based on grounds other than newly discovered evidence "must be made within 7 days after [the] verdict . . . or within such further time as the

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[7]Summers v. Sheriff, 90 Nev. 180, 182, 521 P.2d 1228, 1228 (1974) (quoting Roth v. United States, 354 U.S 476, 491 (1957) (quoting United States v. Petrillo, 332 U.S. 1, 8 (1947))).

[8]109 Nev. 205, 849 P.2d 336 (1993).

[9]Id. at 215, 849 P.2d at 343 (citations omitted).

court may fix during the 7-day period." Similarly, NRS 175.381(2) provides that a motion for a judgment of acquittal based on insufficient evidence must be made within 7 days after the verdict. Here, appellant filed the motion more than 7 days after the verdict. Moreover, the claims raised by appellant do not fall within the category of newly discovered evidence which may be raised in a motion for a new trial made within 2 years after the verdict pursuant to NRS 176.515(3).[10]

Second, even assuming that the juror misconduct claim does constitute newly discovered evidence, we conclude that the allegation in juror Walker's affidavit that she was "coerced, intimidated, harassed, and belittled by other members of the jury" is not admissible for purposes of impeaching the jury's verdict and does not evidence juror misconduct warranting a new trial.[11] The latter conclusion is further buttressed by juror Walker's failure to repudiate her verdict when polled by the district court.[12]

We also reject appellant's claim that trial counsel provided ineffective assistance by failing to file the motions in a timely fashion. We conclude that appellant cannot

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[10]See Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (noting that trial judge's determination that evidence of guilt is conflicting and disagreement with jury's verdict based on independent evaluation of evidence constitutes "other grounds" for new trial subject to NRS 176.515(4)); McLemore v. State, 94 Nev. 237, 239, 577 P.2d 871, 872 (1978) (stating that evidence is newly discovered if, among other things, it would make a different result probable on retrial); accord United States v. Hanoum, 33 F.3d 1128, 1130 (9th Cir. 1994) (holding that a motion for newly discovered evidence "is limited to where the newly discovered evidence relates to the elements of the crime charged" and would make a different result probable on retrial).

[11]See NRS 50.065(2); United States v. Stansfield, 101 F.3d 909, 914 (3d Cir. 1996); United States v. Moses, 15 F.3d 774 (8th Cir. 1994); People v. Rudnick, 878 P.2d 16, 21 (Colo. Ct. App. 1993).

[12]See Tinch v. State, 113 Nev. 1170, 1174, 946 P.2d 1061, 1064 (1997).

demonstrate that counsel's performance fell below an objective standard of reasonableness or that appellant was prejudiced by counsel's failure to file the motion within 7 days after the verdict.[13]

Finally, appellant claims that counsel provided ineffective assistance prior to and during the trial. As a general rule, claims of ineffective assistance of counsel may not be raised on direct appeal from a judgment of conviction, "unless there has already been an evidentiary hearing."[14] In this case, there has been no evidentiary hearing, so appellant's claims are more appropriately raised in a post-conviction proceeding. Accordingly, we need not address appellant's claims on direct appeal.

Having considered appellant's contentions and concluded that they either lack merit or are not appropriate for review on direct appeal, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Carmine J. Colucci & Associates
Clark County Clerk

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[13]See Strickland v. Washington, 466 U.S. 668 (1984).

[14]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).