IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL GROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40157

FILED

JAN 28 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one gross misdemeanor count of indecent exposure. The district court sentenced appellant Michael Gross to serve one year in the Clark County Detention Center.

First, Gross contends the State adduced insufficient evidence at trial to sustain his conviction beyond a reasonable doubt. Gross argues that no evidence was presented indicating that he was in a public place or readily observable, or that he exposed himself intentionally. We disagree with Gross' contention.

When reviewing a claim of insufficient evidence, the relevant inquiry 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.'"[1] Further, "it is the

[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[2] In other words, a jury "verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court."[3] We also note that "[c]ircumstantial evidence alone may sustain a conviction."[4]

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[5] In particular, we note that two pre-teen girls testified that while they were playing in the backyard, their attention was drawn to lights being turned on and off in Gross' neighboring house. When they looked, they saw Gross standing naked in front of a body-length window, holding his penis and "scratching his private area with his pinkie." Gross turned the lights to his bedroom on and off several times, and opened and closed the window blinds. When an adult was informed and appeared in the backyard to investigate, Gross' "body jerked up, just alarmed. And

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[2]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853-54 (2000).

[3]Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972); see also Nev. Const. art. 6, § 4; NRS 177.025.

[4]McNair, 108 Nev. at 61, 825 P.2d at 576; Walker v. State, 113 Nev. 853, 861, 944 P.2d 762, 768 (1997).

[5]NRS 201.220(1)(a) states that "[a] person who makes any open and indecent or obscene exposure of his person, or of the person of another, is guilty . . . of a gross misdemeanor."

then we made eye contact and he just reached over and closed the blinds, turned off the light." Therefore, we conclude that sufficient evidence was presented to convict Gross of indecent exposure.[6]

Second, Gross contends that, as a matter of law, he could not be guilty of indecent exposure "when he was in his own home and the alleged victims were not in his own home with him." More specifically, Gross argues that his exposure was not "open" as required by NRS 201.220(1). We disagree. Gross has not provided any relevant authority in support of his interpretation of the statute. The plain language of the statute does not shelter a person from prosecution for indecent exposure based on behavior committed in the home that is readily observable from outside. And as we discussed above, the jury concluded that Gross' exposure was not accidental, and sufficient evidence was established to support his conviction beyond a reasonable doubt.[7]

Third, Gross contends the jury was unduly pressured into reaching a "compromise" verdict. The jury was advised at approximately 4:40 p.m., on May 16, 2002, that deliberations would continue the next day if a verdict was not reached by 5:00 p.m. At 5:00 p.m., the parties were informed that a verdict had been reached. Gross argues that the jury was

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[6]We note that the jury found Gross not guilty of open or gross lewdness.

[7]See generally Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993); Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

rushed and coerced, and that the verdicts were inconsistent and conflicting because, based on the same evidence, the jury found him guilty of a specific intent crime (indecent exposure) and not guilty of a general intent crime (open or gross lewdness). We disagree.

Prior to sentencing, Gross filed a motion for a new trial based on jury coercion and conflicting evidence. The State opposed the motion based on its untimeliness, arguing that Gross' motion was filed 30 days after the verdict was reached.[8] The district court conducted a brief hearing and denied the motion.

We conclude that the district court did not err in denying the motion for a new trial, and that Gross' contentions are without merit. There is no indication from the record on appeal that the jury was pressured or even encouraged to reach a verdict by 5:00 p.m., only that they would be excused for the day at that time. Further, there was no indication that the jury was deadlocked and vulnerable to being swayed by an instruction from the court.[9] When the jury was polled after the reading of the verdict to determine whether all concurred, each juror individually answered in the affirmative without discussion. Therefore, we conclude that the district court did not improperly coerce the jury into reaching a

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[8]NRS 176.515(4) states: "A motion for a new trial . . . must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period."

[9]See Allen v. United States, 164 U.S. 492 (1896); Staude v. State, 112 Nev. 1, 908 P.2d 1373 (1996).

verdict, and instead, made an administrative decision to bring an end to the day's work.

Additionally, we perceive no inherent illogic in the jury's verdict finding Gross guilty of indecent exposure and not guilty of open or gross lewdness. And we also note that Gross did not object to the allegedly inconsistent verdict before the jury was dismissed.[10] But even assuming, without deciding, that the verdicts were inconsistent, this court has held that inconsistent verdicts are permitted.[11] This view is consistent with federal law.[12] Therefore, we conclude that Gross' contention is without merit.

Finally, Gross contends the district court abused its discretion at sentencing because the sentence is too harsh. Gross speculates that a term of probation might have been imposed until the parents of one of the victims testified. As a result of their allegedly improper remarks, Gross

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[10]Cramer v. Peavy, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000) ("The efficient administration of justice requires that any doubts concerning a verdict's consistency with Nevada law be addressed before the court dismisses the jury.").

[11]See, e. g., Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675-76 (1995); Brinkman v. State, 95 Nev. 220, 224, 592 P.2d 163, 165 (1979).

[12]See Dunn v. United States, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.").

argues that he was punished based on "speculation, hearsay, and innuendo by two very biased people." We disagree.

This court has consistently afforded the district court wide discretion in its sentencing decision,[13] and will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[14] The sentencing judge, moreover, "is privileged to consider facts and circumstances which would clearly not be admissible at trial."[15] Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.[16]

In the instant case, Gross cannot demonstrate that the district court relied only on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. The sentence imposed was within

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[13]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[14]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (emphasis added).

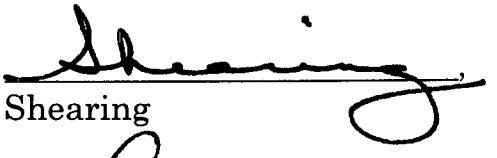
[15]Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996).

[16]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

the parameters provided by the relevant statutes.[17] Further, we note that the granting of probation is discretionary.[18] Accordingly, we conclude the sentence imposed is not too harsh, is not disproportionate to the crime, does not constitute cruel and unusual punishment, and that the district court did not abuse its discretion at sentencing.

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

ORDER the judgment of conviction AFFIRMED.



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Shearing

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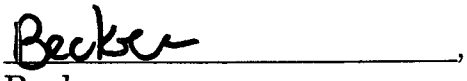

_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[17]See NRS 193.140; NRS 201.220(1)(a).

[18]See NRS 176A.100(1)(c).