IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 41026

FILED

DEC 0 1 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant Christopher E. Pigeon guilty of a single count of open or gross lewdness, a gross misdemeanor. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

The State alleged and provided proof that Pigeon masturbated in a McDonald's restaurant in the presence of at least one child and restaurant personnel. Following the jury's guilty verdict, the district court sentenced Pigeon to 200 days in the Clark County Detention Center, imposed a $25 administrative assessment and a $150 DNA analysis fee, and ordered genetic marker testing. Finally, the district court ordered that Pigeon receive credit for 157 days of time served in local custody prior to the imposition of sentence.

On appeal, Pigeon argues that insufficient evidence supports his conviction and that Nevada's lewdness statute violates both the United States and Nevada Constitutions.

DISCUSSION

Sufficiency of the evidence

Pigeon contends that insufficient evidence supports the jury's verdict.

In reviewing the sufficiency of evidence introduced in support of a criminal conviction, this court will consider "'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] Here, however, "[t]he . . . [elements] of 'open or gross lewdness' as set forth in NRS 201.210 . . . [have] not been defined by the Nevada Legislature."[2] Generally, in addressing an offense that the Legislature has not explicitly defined, we "look to the provisions of the common law relating to the definition of that offense."[3]

"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."[4] A conviction under NRS 201.210 "does not require proof of intent to offend an observer . . . [and] [i]t is sufficient that the public

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

[2]Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

[3]Id.

[4]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)).

sexual conduct . . . was intentional."[5] In the present case, the district court utilized the common law definition of open or gross lewdness in its instructions to the jury outlining the parameters of the offense. We now turn to an analysis of whether the State sufficiently satisfied the common law elements of open or gross lewdness at Pigeon's trial in district court.

The State presented testimony below that Pigeon did more than merely adjust or accidentally touch his genitals. Witnesses observed Pigeon change seat positions within the restaurant several times and continue repeated acts of masturbation under his clothing. Evidence also suggested that his changes in position coincided with the movements of a child of one of the restaurant employees. Although Pigeon points to numerous discrepancies in the testimony of the State's witnesses, "[w]here conflicting testimony is presented, the jury determines what weight and credibility to give it."[6] When viewed in a light most favorable to the State, we conclude that the State presented sufficient evidence to establish that grossly indecent sexual conduct was openly committed and observed by persons lawfully present.

Vagueness

Pigeon contends that Nevada's open or gross lewdness statute violates both the United States and Nevada State Constitutions because it does not provide fair notice of prohibited conduct and lacks clear standards for law enforcement.

"This court reviews the constitutionality of statutes de novo [and] [t]he burden is on the challenger to make a clear showing of the

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[5]Id.

[6]Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

unconstitutionality of a statute."[7] The Due Process Clause does not require impractical levels of precision in a criminal statute,[8] and "a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute."[9]

NRS 201.210, in pertinent part, states:

> 1. A person who commits any act of open or gross lewdness is guilty:
>
> (a) For the first offense, of a gross misdemeanor.
>
> (b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.

In order to succeed on a vagueness challenge, Pigeon must show that the statute and interpretative case law did not provide him with notice that his particular behavior was punishable.[10] As noted above, this court has previously examined this statute and adopted the common law definition of the crime.[11] Under Young and Ranson, Pigeon had fair notice that masturbating in a McDonald's restaurant is criminal conduct

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

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

[9]Id.

[10]See Winters v. New York, 333 U.S. 507, 514-15 (1948) (judicial construction of a statute may provide adequate notice of illegal conduct).

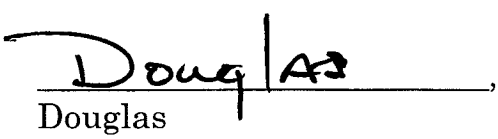
[11]Young, 109 Nev. at 215, 849 P.2d at 343; Ranson, 99 Nev. at 767, 670 P.2d at 575.

punishable under NRS 201.210.[12] Finally, Nevada case law likewise provides officers with sufficient guidelines upon which to base an arrest and does not encourage arbitrary or discriminatory enforcement.[13] Thus, the open or gross lewdness statute is not unconstitutionally vague. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin



_____, J.
Douglas

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

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[12]See Young, 109 Nev. at 215, 849 P.2d at 343; Ranson, 99 Nev. at 767, 670 P.2d at 575.

[13]See Young, 109 Nev. at 215, 849 P.2d at 343; Ranson, 99 Nev. at 767, 670 P.2d at 575.