

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42603

FILED

MAY 12 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of indecent exposure and open or gross lewdness. The district court sentenced appellant Ferrill Joseph Volpicelli to serve two concurrent prison terms of 12-48 months and ordered him to pay a fine of \$10,000.00.

First, Volpicelli contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of indecent exposure and open or gross lewdness. Volpicelli argues that he should not have been found guilty because the acts for which he was convicted occurred "in his vehicle and not in public view." We disagree with Volpicelli's contention.

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.¹ In particular, we note that Detective Patricia Allen of the Reno Police Department testified at trial that she was instructed to investigate a vehicle parked in the lot outside of a Shopko and a Safeway

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

store, approximately 30-40 yards from the front entrances. Detective Allen stated that she arrived at the busy parking lot at 2:30 p.m.; she walked by the vehicle and saw Volpicelli through the “lightly-tinted” windows in the backseat, they made eye contact and the detective continued past the vehicle. Less than one minute later, Detective Allen turned around and headed back towards the vehicle in question. This time, Detective Allen saw Volpicelli laying down on the backseat of the vehicle, his shirt “was pulled up around the top part of his chest . . . [and] [h]is pants were pulled down around his knees, along with his underwear.” Detective Allen testified that she could clearly see Volpicelli’s exposed penis in his right hand, and that he was masturbating.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Volpicelli committed the crimes of indecent exposure and open or gross lewdness.² This court has stated that a conviction for both indecent exposure and open or gross lewdness requires intentional public sexual conduct or exposure.³ Here, Volpicelli intentionally exposed his penis and masturbated in the backseat of his vehicle while parked in a busy public parking lot in the middle of the afternoon. Although Volpicelli’s actions took place in the backseat of his vehicle, he was readily observable by any passerby, and therefore, his argument that he was not in public view is without merit. It is for the

²NRS 201.220(1)(b) (“[a] person who makes any open and indecent or obscene exposure of his person . . . is guilty . . . [f]or any subsequent offense, of a category D felony”); NRS 201.210(1)(b) (“[a] person who commits any act of open or gross lewdness is guilty . . . [f]or any subsequent offense, of a category D felony”).

³See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993); Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983).

jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.⁴ We also note that circumstantial evidence alone may sustain a conviction.⁵ Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Volpicelli contends that the district court erred at sentencing by admitting into evidence a prior conviction in order to enhance his conviction to a felony pursuant to NRS 201.210(1)(b) and NRS 201.220(1)(b). In 1983, Volpicelli was charged with indecent exposure, a gross misdemeanor. Volpicelli argues that a review of the change of plea hearing transcript reveals that there was never a written waiver of rights, he was not thoroughly canvassed by the district court, "[b]ut, most of all, it shows that the district court failed to ask Defendant how he wished to plea[d]." Volpicelli claims that "[t]he failure to ask [him] how he wished to plea[d] negated the prior conviction," and therefore, could not be used for enhancement purposes in the instant case. We disagree with Volpicelli's contention.

To establish the validity of a prior misdemeanor conviction, the State must "affirmatively show . . . that counsel was present . . . and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."⁶ "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally

⁴See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁵See Buchanan v. State, 119 Nev. ___, ___, 69 P.3d 694, 705 (2003).

⁶Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

adequate.”⁷ “[I]n consideration of the realities of misdemeanor prosecutions,” a formal, written judgment of conviction is not necessary if other documents provide sufficient evidence of the conviction.⁸ The burden shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.⁹

In the instant case, we conclude that the State has met its burden and demonstrated that the spirit of constitutional principles was respected. Volpicelli was represented by attorney Lew Carnahan on September 22, 1983, when he pleaded guilty to gross misdemeanor indecent exposure. Our review of the change of plea hearing transcript reveals that Volpicelli was present when Carnahan informed the district court about the plea negotiations and that Volpicelli agreed to plead guilty to indecent exposure with the hope of receiving probation. The district court asked Volpicelli if he had any questions about the proceedings, and he replied that he did not. In response to the district court’s questions, Volpicelli affirmatively answered that: it was his intent to plead guilty; Carnahan explained the rights he was waiving by pleading guilty; he was not coerced or induced by any means to plead guilty; and he was pleading voluntarily. Volpicelli also informed the district court that he was aware of the possible sentencing options, that the matter of sentencing was left to the district court, and that he was pleading guilty because he was, in fact, guilty of indecent exposure.

⁷Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878, 880 (1996).


⁸English v. State, 116 Nev. 828, 836, 9 P.3d 60, 64 (2000); see also Pettipas v. State, 106 Nev. 377, 794 P.2d 705 (1990).

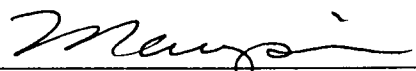
⁹Davenport, 112 Nev. at 478, 915 P.2d at 880.

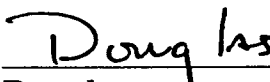
We also note that included in the record on appeal is a waiver of preliminary examination form signed by Volpicelli in 1983, and the criminal information stating that Volpicelli was being charged with "open, indecent, and obscene exposure of his person" for actions taking place in the parking lot of a Mervyn's store. Accordingly, based on all of the above, we conclude that the district court did not err in using the 1983 indecent exposure conviction to enhance Volpicelli's sentence in the instant case to a felony.

Having considered Volpicelli's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.¹⁰


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. James W. Hardesty, District Judge
John J. Kadlic
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁰Because Volpicelli is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Volpicelli unfiled all proper person documents he has submitted to this court in this matter.