IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KEITH ABNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57619

FILED

JUN 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of open or gross lewdness and indecent or obscene exposure. Eighth Judicial District Court, Clark County; Lee A. Gates, Senior Judge.

Sufficiency of evidence

Appellant Brian Keith Abner contends that insufficient evidence supports his convictions because the State failed to prove he was the one who committed the charged offenses. We disagree and conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that a black male with a tattooed face, wearing a black hooded sweatshirt and black baseball shorts, stopped in front of the victim's car while crossing the street, pulled down his pants, held his penis, and jumped up and down. The police found a man matching the perpetrator's description ten minutes later, a short distance

from the scene of the incident. The victim identified the man, Abner, as the perpetrator.

We conclude that a rational juror could reasonably infer from this testimony that Abner was the one who exposed himself to the victim and committed a lewd act. See NRS 201.210(1); NRS 201.220(1). It is for the 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, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Amended information

Abner contends that the district court erred by allowing the State to amend the information at the close of its case-in-chief. An information may be amended at any time before the verdict is rendered so long as the amendment does not allege additional or different offenses and the defendant's substantial rights are not prejudiced. NRS 173.095(1). Here, the district court allowed the State to change the statement of the act constituting lewdness from "by the Defendant exposing his penis to [the victim]" to "by the Defendant grabbing his exposed penis and shaking his penis at or in the direction of [the victim]" so that the charge would conform to the evidence. We note that the State's amendment did not change the theory of prosecution, see State v. Dist. Ct., 116 Nev. 374, 377, 997 P.2d 126, 129 (2000), or "negate[ ] the method of defense adopted throughout the trial," Green v. State, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978). And we conclude that Abner's substantial rights were not prejudiced and the district court did not abuse its discretion by allowing the information to be amended. See Viray v. State, 121 Nev. 159, 162, 111

P.3d 1079, 1081-82 (2005); Shannon v. State, 105 Nev. 782, 785, 783 P.2d 942, 944 (1989).

Prosecutorial misconduct

Abner contends that the prosecutor committed misconduct by arguing facts not in evidence, implicitly vouching for the victim's identification, and indirectly comparing him to a convicted rapist during rebuttal argument. Abner did not object to any of these alleged instances of prosecutorial misconduct and we conclude that he has not demonstrated reversible plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims for plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (placing the burden on the defendant "to show actual prejudice or a miscarriage of justice"); see also NRS 178.602.

Double jeopardy and redundancy

Abner contends that his convictions violate the Double Jeopardy Clause and are redundant because they punish the same illegal act. "The Double Jeopardy Clause . . . protects defendants from multiple punishments for the same offense. [We use] the test set forth in Blockburger v. United States to determine whether multiple convictions for the same act or transaction are permissible." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (footnotes omitted). And even if multiple convictions for the same act are permitted under Blockburger, "we will reverse redundant convictions that do not comport with legislative intent." Id. (internal quotation marks omitted). In considering whether convictions are redundant, we examine "whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions." State of Nevada v. Dist.

Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000). In other words, two convictions are redundant if the charges involve a single act so that "the material or significant part of each charge is the same." Id.

Abner's convictions do not implicate the Double Jeopardy Clause because each of his offenses requires proof of an element that the other does not, see NRS 201.210(1) (requiring an act of lewdness); NRS 201.220(1) (requiring an indecent or obscene exposure), and they are not redundant because the gravamens of the offenses are different: the gravamen of the indecent exposure is that Abner exposed his penis to the victim whereas the gravamen of the lewdness is that he grabbed his penis and shook it in the direction of the victim. Accordingly, we conclude that the offenses do not punish the same illegal act and are not redundant.

Felony adjudication

Abner contends that the district court erred by adjudicating him a felon under both NRS 201.210 and NRS 201.220 because he did not have any prior Nevada convictions for open or gross lewdness or indecent exposure and neither statute explicitly contemplates the use of convictions from other jurisdictions to enhance the penalty to a felony. Thus, Abner presents an issue of statutory construction.

"[W]e review questions of statutory interpretation de novo," our interpretation is controlled by legislative intent, and we will not look beyond a statute's plain meaning to determine legislative intent if the statute is clear on its face. State v. Lucero, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011). However, if the statute is ambiguous, we will look to the legislative history, reason, and public policy to determine legislative intent. Id. A statute is ambiguous if "lends itself to two or more reasonable interpretations." Id. (internal quotation marks omitted); see

also Mason v. Cuisenaire, 122 Nev. 43, 50, 128 P.3d 446, 450 (2006) (a statute is ambiguous if it "is susceptible to more than one interpretation, or if it otherwise does not speak to the issue at hand").

Both NRS 201.210(1) and NRS 201.220(1) are silent on the issue of whether foreign convictions can be used to enhance the penalty from a gross misdemeanor to a felony. We conclude that these statutes could be interpreted differently by reasonable people and therefore are ambiguous as to whether foreign convictions can be used for enhancement purposes.

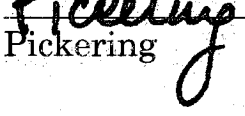
We note that the legislative history of NRS 201.210 and NRS 201.220 reveals that the penalty language was added during a general overhaul of Nevada's penal statutes and the use of foreign convictions was not discussed. See generally Legislative Commission of the Legislative Counsel Bureau, Revision of Nevada's Substantive Criminal Law and Procedure in Criminal Cases, Bulletin No. 66 (Nev. 1966). The Legislature has expressly addressed the use of foreign convictions for enhancement purposes in many of Nevada's penal statutes, see, e.g., NRS 200.485(9)(c); NRS 201.230(3)(b); NRS 207.010(1)(a), (b); NRS 207.012(1)(b); NRS 207.014(1)(b); NRS 453.316(2); NRS 453.321(2)(b)-(c), (4)(b)-(c); NRS 453.336(2)(b); NRS 453.337(2)(b), (c); NRS 453.338(2)(b); NRS 484C.400(7)(c); NRS 484C.410(1)(d); see also NRS 176A.100(1)(b), but chose not to address the use of foreign convictions in either NRS 201.210 or NRS 201.220. And, as matter of public policy, the use of foreign convictions to enhance the punishments for lewdness and indecent exposure may be fundamentally unfair given the wide variety of definitions used by other jurisdictions to define these crimes. See generally State v. Castaneda, 126 Nev. ___, ___, 245 P.3d 550, 554-55

(2010) (discussing indecent exposure statutes of other jurisdictions); Berry v. State, 125 Nev. 265, 281-282, 212 P.3d 1085, 1096-97 (2009) (discussing lewdness statutes of other jurisdictions), overruled on other grounds by Castaneda, 126 Nev. ___, 245 P.3d 550. We conclude that NRS 201.210 and NRS 201.220 are, at best, ambiguous as to the use of foreign convictions and that these ambiguities must be construed in Abner's favor. See Lucero, 127 Nev. at ___, 249 P.3d at 1230. Accordingly, Abner's offenses are to be treated as first offenses and punished as gross misdemeanors. See NRS 201.210(1)(a); NRS 201.220(1)(a).

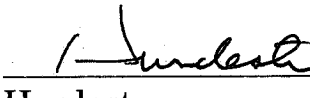
Having considered Abner's contentions and for the reasons discussed above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Saitta



_____, J.
Pickering



_____, J.
Hardesty

cc: Chief Judge, Eighth Judicial District Court
Hon. Lee A. Gates, Senior Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk