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APR 30 2014

King County Prosecutor  
Appellate Unit

COURT OF APPEALS NO. 71399-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON

V.

E.N.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION

The Honorable Wesley Saint Clair, Judge

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OPENING BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2014 APR 30 PM 4:09

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A. ASSIGNMENT OF ERROR

The state failed to prove all the elements of the offense beyond a reasonable doubt as required under the Due Process Clauses of the state and federal constitutions.

Issue Pertaining to Assignment of Error

Whether juvenile appellant E.N. was convicted in violation of his due process rights where the evidence showed in the state's prosecution for indecent exposure that E.N. never exposed his genitals, a required element of the offense?

B. STATEMENT OF THE CASE

At around 7:00 p.m. on September 13, 2012, Craig Richardson drove into the parking lot of the Avana Apartments in the Bothell-Woodinville area. RP 92-94. Richardson was planning to lease an apartment there and wanted to get a feel for the place at night, i.e. whether there was a lot of traffic, etc. RP 93, 108.

As Richardson drove through the parking lot, he noticed a naked man standing by a carport in front of one of the buildings. RP 94-95. Richardson slowed down, stopped and looked several times to confirm what he was seeing. RP 94-95.

Noticing another tenant, Richardson parked and approached him to inquire whether the tenant had seen the man, too. RP 107.

The tenant had not; as soon as Richardson approached him, the naked man walked back into the apartments. RP 95, 103.

Richardson called 911 and reported what he had seen, specifically a nude, white man in his thirties with reddish hair and glasses, and that he had gone back toward building 8. RP 97, 102-103, 111. Richardson described the man as nonchalant, "like he came out for a breath of fresh air." RP 103.

Richardson told the dispatcher the man was just standing there, covered and not doing anything sexual:

Yeah, he had his hand on his crotch and he wasn't doing anything sexual or anything. He just had his hand on his crouch [sic] and it looked like he was out getting some fresh air.

RP 104.

On cross-examination, Richardson confirmed the man was holding his crotch and Richardson did not in fact see his genitals.

RP 106.

Richardson drove to the apartment complex office. It was closed, but Richardson talked to a woman through the glass, told her what he had seen and that he would not be renting an apartment there. RP 105. On his way out, Richardson ran into the police. RP 105.

Bothell police officer Erik Martin responded and spoke with Richardson, who pointed him to building B.<sup>1</sup> RP 17. Martin knocked on one of the apartments where tenants were clearly home and asked if they knew of anyone who met Richardson's description. RP 19. The tenants directed Martin to apartment B-102.

13 year-old E.N. answered the door. RP 19, 44, 140. After some small talk and Martin's admonition that E.N. did not have to talk to him, Martin asked E.N. why he had been outside naked. RP 19-20. E.N. supposedly said he liked to do that sometimes because it aroused him. RP 118, 120. According to Martin, E.N. said he had engaged in this behavior for about four months on occasions when his mother was not home. RP 119.

At the close of the state's case, E.N. moved to dismiss on grounds the state had not proven an open and obscene exposure because E.N. did not expose his genitals. RP 124. Reasoning that it could be inferred E.N.'s presence was intentional and that his purpose was for arousal, the court found the state made a prima facie case to proceed. RP 128.

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<sup>1</sup> The court incorporated some of Martin's testimony from the CrR 3.5 hearing into the trial, in order to save time. RP 115.

The defense rested, but argued in closing that the state failed to prove an essential element of the offense, because it presented no evidence E.N. exposed his genitals. RP 135. The defense argued further that “mere nudity” is not “in and of itself obscene.” RP 135.

The court interrupted to ask whether the parties had any case law on the subject, noting that the indecent exposure statute does not define “open and obscene.” RP 135; see also RP 141. When neither party could cite any particular case, the court further noted that the United States Supreme Court had indicated, “obscenity is in the eyes of the community.” RP 135-136.

The defense reiterated that because E.N. had his genitals covered, there was no open exposure. RP 137.

In rendering its decision, the court noted: “The real question is, you know, is this obscene.” RP 144. Apparently reading from a legal dictionary, the court noted its definition as: “Extremely offensive under contemporary community standards of morality and decency, grossly repugnant to the generally-accepted notions of what is appropriate.” RP 144.

The court further noted that under the Supreme Court’s three-part test:

Material is legally obscene and therefore not protect[ed] under the First Amendment if taken as a whole the material appeals to the prurient interests in sex as determined by the average person applying contemporary community standards, portrays sexual conduct as specifically defined by the applicable State law in a patently offensive way and lacks serious literary, artistic, political or social value.

RP 144.<sup>2</sup>

Apparently applying this test, the court made several findings. First, that Richardson clearly found E.N.'s conduct offensive. RP 145. Second, that E.N. must have known standing outside naked was not generally accepted within the community, because he admitted to doing it only when his mother was not home. Third, that because the apartment complex was not set up as a "nudist spot," E.N. would have known his conduct was likely to cause reasonable affront or alarm. RP 145. The court concluded "the State has in fact has proven that the respondent knew such conduct was likely to cause reasonable affront and alarm and did and did intentionally make an open and obscene exposure of his person." RP 145-46.

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<sup>2</sup> See e.g. Miller v. California, 413 U.S. 15, 23-24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

C. ARGUMENT

THE CONVICTION VIOLATES E.N.'S DUE PROCESS RIGHTS BECAUSE THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE.

Richardson, the state's only eye-witness, testified he saw E.N. with his hands covering his crotch. Richardson testified he did not see E.N.'s genitals or E.N. behaving in a sexual manner. Whether Richardson was alarmed or offended by E.N.'s behavior, it did not constitute indecent exposure. Contrary to the trial court's conclusion, it has long been the law in Washington that the charge of indecent exposure requires the prosecution to prove the individual exposed his or her genitals. In convicting E.N. in the absence of this evidence, the court misapplied the law and violated E.N.'s due process rights. Because the state presented no evidence of this required element, E.N.'s conviction must be reversed.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, viewed in the light most

favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

Whether the state must prove that E.N. exposed his genitalia as an element of the crime of indecent exposure is a question of law this Court reviews de novo. State v. Vars, 157 Wn. App. 482, 489, 237 P.3d (2010). Under RCW 9A.88.010(1), “[a] person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.”

As this Court noted in Vars:

This statute does not define or expressly incorporate any definition for the phrase “any open and obscene exposure of his or her person.” When a statute fails to define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term. Since at least 1966, Washington common law has defined this phrase as “a lascivious exhibition of those *private parts* of the person which instinctive modesty, human decency, or common propriety require shall be customarily covered in the presence of others.”

Vars, 157 Wn. App. at 489-90 (emphasis added) (some internal quotations and citations omitted) (quoting State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1996)).

In turn, “private parts” means genitalia. Vars, 157 Wn. App. at 491 n.15 (acknowledging that “RCW 9A.88.010 requires an exposure of genitalia in the presence of another”). The term “private parts” is “generally understood as a commonplace designation of the genital procreative organs.” State v. Dennison, 72 Wn.2d 842, 846, 435 P.2d 526 (1967).

Richardson testified E.N. was nude, but that his hands were covering his crotch and he did not see E.N.’s genitalia. The state therefore failed to prove an exposure of genitalia in the presence of another, as required under the statute. The evidence was therefore insufficient to convict and this Court should reverse and dismiss the conviction with prejudice. See e.g. State v. Arquette, 178 Wn. App. 273, 314 P.3d 426 (2013).

D. CONCLUSION

Because the state failed to prove an essential element of the offense, this Court should reverse and dismiss the conviction.

Dated this 29<sup>th</sup> day of April, 2014

Respectfully submitted

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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Respondent,

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COA NO. 71399-0-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] E.N.  
12712 NE 180<sup>TH</sup> STREET  
#102  
BOTHELL, WA 98011

SIGNED IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL 2014.

X Patrick Mayovsky

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2014 APR 30 PM 4:08