

COA No. 30206-7-III

FILED

MAR 28 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SAMUEL WADE HOWARD, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
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(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support a finding of guilt.

Issue Pertaining to Assignment of Error

1. Was the State's evidence insufficient to support Samuel Wade Howard's conviction of indecent exposure when he did not intentionally make an open and obscene exposure of his person knowing that such conduct was likely to cause reasonable affront or alarm? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Howard was charged by information and by first amended information with one count of indecent exposure with notice of a sexual motivation allegation. (CP 1, 23). Mr. Howard filed a *Knapstad* motion to dismiss. (CP 25). The court denied the motion. (CP 53-55).

The State filed a second amended information charging Mr. Howard with one count of felony indecent exposure in violation of RCW 9A.88.010(1), (2)(c). (CP 56; Lang 7/20/11 RP 11; Munoz 8/26/11 RP 42). The case proceeded to a stipulated facts trial by special setting before the judge who had heard the *Knapstad*

motion. (CP 52). The stipulated facts were contained in the police report:

On 1/28/10 at 0641, a passer by called to report someone was walking with a short skirt and garter on OIE near District Line. Due to the time and proximity the R/P stated it may be a female in need of help.

I [Deputy Doug Hollenbeck] then arrived in the area at 0659. As I drove up behind the individual, I could clearly see a man walking slowly and hitchhiking. The man's attire was quite alarming. He was wearing a small skin-tight mini-skirt that had scooted up his buttocks. The skirt was only covering a little over half of his rear end. His lower half of his buttocks was clearly exposed. The man was also wearing black nylons with a garter. His upper torso was covered with a flannel.

I then activated my overheads and contacted the male. As he turned around I could see his genitalia area hanging below the skirt. The area had a piece of thin sheer nylon over the top and left nothing to the imagination.

Upon contacting the male he identified himself as Samuel Howard. Moments after contacting Samuel, a school bus with children passed by.

Samuel then explained he was walking from a friend's house. He would not say who's [sic] house, nor would he give any further details. This was later determined to be a lie.

After several minutes, I was advised by dispatch the male was a Level 3 sex offender. I then asked Samuel to explain exactly how he ended up walking on the side of the road in this state.

Samuel then said he was "horny" and was trying to be picked up by a man. He stated he took his jeans off in the field and was trying to entice a man to pick him up. Samuel then walked about 40 yards away and put his jeans on. The jeans were lying out in the sagebrush off OIE.

I then took a couple pictures of Samuel on the side of the road. The pictures only show Samuel after he had pulled down his skirt. At the time of the initial contact the skirt was almost halfway up his buttocks. More pictures were taken at the jail.

I then advised Samuel he was being placed under arrest for Felony Indecent Exposure.

While en route to the jail, Samuel made statements that it wasn't right for him to be walking on the side of the road like that with kids going by in a school bus. He also said he needed to move out of "Bendover" City. He was referring to living in Benton City. (CP 61).

The pictures taken by Deputy Hollenbeck were also considered by the court. (CP 58). From those stipulated facts, the court entered its "Findings Based Upon Stipulated Facts":

1. On January 28, 2010, having been previously convicted of a sex offense, and knowing that such conduct was likely to cause reasonable affront or alarm, the defendant did intentionally make an open and obscene exposure of his buttock and genitalia, knowing that such conduct was likely to cause reasonable affront or alarm.
2. Based upon the stipulated facts presented, the evidence proves the essential elements of Indecent Exposure, RCW 9A.88.010(1)(2)(c) and RCW

9.94A.835, beyond a reasonable doubt.

3. 9.94A.533(1), which is the statute defining the application of the sexual motivation allegation, states, "the provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517." These statutes consist of the sentencing grids for felonies and drug felonies. Unranked felonies are not included in these statutes.

4. Dismissal of the sexual motivation enhancement is appropriate. (CP 58-59).

The court thus declared its verdict:

1. The defendant is guilty of the crime of Indecent Exposure, RCW 9A.88.010(1)(2)(c).

2. The sexual motivation enhancement is hereby dismissed. (CP 59).

Mr. Howard appeals his conviction of indecent exposure.

(CP 78).

III. ARGUMENT

A. The State's evidence was insufficient to support Mr. Howard's conviction of indecent exposure when he did not intentionally make an open and obscene exposure of his person knowing that such conduct was likely to cause reasonable affront or alarm.

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State,

any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); see *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001) (defendant who goes to trial cannot appeal denial of *Knapstad* motion, but can challenge sufficiency of evidence produced at trial). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

Although the court made "Findings Based Upon Stipulated Facts", they were actually conclusions of law and should be treated as such. *Artz v. O'Bannon*, 17 Wn. App. 421, 425, 562 P.2d 674, review denied, 89 Wn.2d 1008 (1977). The inquiry is whether the stipulated facts support the conclusions. *Id.* They do not.

RCW 9A.88.010(1), (2)(c) provides:

(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. . .

(2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor. . .

(c) Indecent exposure is a class C felony if the person has previously been convicted under this section of a

sex offense as defined in RCW 9.94A.030.

In order to convict Mr. Howard of this offense, he must have intentionally made an open and obscene exposure of his person, knowing his conduct was likely to cause reasonable affront or alarm. But even when the stipulated facts are construed in a light most favorable to the State, the most that can be said is Mr. Howard was walking down OIE in rather unusual attire for a male. Considering the earliness of the hour and the way he was dressed, the reporting party thought he was a female who may have needed help. (CP 61). There was no open or obscene exposure of Mr. Howard's person at all.

On his arrival, the deputy's own narrative indicated any exposure of Mr. Howard's buttocks was inadvertent as the mini-skirt had scooted up. (CP 61). Although his buttocks and genitalia may have been exposed, there is no indication that it was done intentionally, much less with the knowledge such conduct was likely to cause reasonable affront or alarm. A school bus by happenstance drove past, but the circumstances and his own statement show that Mr. Howard neither had the intent to expose himself nor to knowingly cause affront or alarm to the school children. (CP 61).

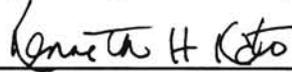
Indeed, it is implicit in the language of the indecent exposure statute that there be a targeted victim because only a victim could be affronted or alarmed by the obscene conduct. *See State v. Snedden*, 149 Wn.2d 914, 919, 73 P.3d 995 (2003). There is no targeted victim here. Although Mr. Howard told the deputy he was horny and trying to get picked up by a man, his statement merely shows that he was trying to accomplish a goal that had nothing to do with intentionally exposing himself to knowingly cause affront or alarm. Rather, Mr. Howard wanted to entice and attract, the direct opposite of causing an affront or alarming someone. These facts are insufficient to prove the elements of the crime beyond a reasonable doubt and thus do not support the court's conclusions. *Green*, 94 Wn.2d at 220; *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Howard respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this 28th day of March, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 28, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Samuel Wade Howard, 155 SW Bennett, Prosser, WA 99350; and Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl., Bldg A, Kennewick, WA 99336.

