

FILED
Feb 14, 2013
Court of Appeals
Division III
State of Washington

No. 307174

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES MOE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE SUSAN L. HAHN, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the court deprived the Appellant, Charles Moe, of his constitutional right to present an alibi defense when it found that the assault charged in Count 1 occurred in the summer of 2011, not in the month of July 2011, as fixed by the evidence?
2. Whether the court erred in concluding that no genital exposure was necessary in order to convict Mr. Moe of the offense of indecent exposure, such that insufficient evidence supported the court's finding of guilt?
3. Whether the court erred in finding Mr. Moe guilty of the offense of gross misdemeanor indecent exposure in the absence of evidence that any child under the age of fourteen years saw an exposure of Moe's genitals?
4. Whether the court erred in ordering Moe to pay court costs without inquiring whether he had the present or future ability to pay his legal financial obligations?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. While Mr. Moe had an alibi for the month of July 2011, the alibi did not cover the entire charging period as provided in

the information. Further, the evidence did not fix the time period in which the offense occurred as within July of 2011.

2. The State concedes that the court incorrectly determined that no genital exposure was necessary to support a finding of guilt on Count 2, indecent exposure. As a result, the court's findings do not support its conclusions, and there is insufficient evidence to support the conviction.
3. With the State's concession as to the second issue raised by the Appellant, the third issue is moot.
4. The State concedes that the court did not make the necessary finding as to ability to pay.

II. STATEMENT OF FACTS

The State is satisfied with Mr. Moe's Statement of the Case but supplements that narrative here. RAP 10.3(b)

When asked when the assault with the knife occurred, A.M. testified as follows:

Q Okay. And when did this take place?

A The day?

Q Yeah.

A When, uhm –

Q Well, if you can't remember the exact date, give us a -- like maybe a month?

A I don't know the date, it was a little close to – it was sometime in the summer.

Q Okay. Was that this past summer?

A Yeah, this past summer.

Q So 2011, okay. So it was sometime during the summer. Do you remember if it was before the 4th of July or after the 4th of July?

A A little bit after the 4th of July.

Q Okay, so sometime in the month of July 2011,
this incident in the laundry room at your house took place?

A Yeah.

(RP 90-91)

In its Findings of Fact and Conclusions of Law, the
court addressed A.M.'s ability to describe when the events in
question occurred:

2. It is clear from the testimony that sometime during the
summer of 2011, the Respondent committed the acts
complained of in Yakima, Washington. A.M.M.'s
testimony about what occurred was very credible. The
Court believes his ability to accurately when they occurred
is impaired. A.M.M. is a special needs child with a low IQ.
He is a vulnerable victim. He is sometimes confused by the
questions.

(CP 22)

As to Count 2, A.M. described the pool incident in
this manner:

A . . . Well, actually – yeah, and then we were out
playing and then he pulled down his pants –

Q Okay.

A -- and –

Q Why don't we stop you right there, we're going
to – I know it might be embarrassing to talk about, but we

don't – we don't know what happened unless you tell us;

okay, A-----?

A Okay.

Q So when he pulled down his pants, was he wearing anything underneath?

A Yeah, he was.

Q Okay, what was he wearing?

A Boxers.

Q And what was he – was he wearing a swimsuit that he pulled down?

A No, he had his shorts and boxers underneath it.

Q And because he was wearing his boxers, you weren't able to see his private parts?

A We didn't see his private part but we saw his other part on the backside.

Q Okay. And is that on the front side of your body or on the back side of your body?

A The back side.

Q Okay. And is there any other words that you call it?

A We do call it the other word.

Q Okay, and what's that?

A It's a little hard to say, could I spell it out?

Q Sure.

A B-U-T-T.

Q Okay.

...

Q Okay. And did you see any bare skin?

A Bare skin?

Q Yeah.

A Like, yeah.

Q Okay, what'd you see?

A 'Cause he pulled down his box – he pulled down
his shorts and his boxers.

Q Okay.

A So is that what bare skin is?

Q Yeah. So bare skin –

A Yeah.

...

A Okay. We – we saw his butt.

Q Okay. And was that because he was facing you
or he was turned away from you?

A He was turned away from us.

(RP 93-96)

The State stipulates that Mr. Moe was incarcerated from June 30, 2012 through August 8, 2011. **(CP 20)**

The information filed by the State charged Mr. Moe with one count of second degree assault, and one count of indecent exposure. The charging period as to each was “[o]n or about or between June 1, 2011 through August 1, 2011”. **(CP 18)**

III. ARGUMENT

1. The court did not deprive Moe of his right to present an alibi defense, and the court’s finding that the offense occurred during the summer of 2011 is supported by the evidence.

The right to present testimony in one’s defense is guaranteed by both the Sixth Amendment to the United States Constitution, as well as article I, section 22 of the Washington State Constitution. State v Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Where the evidence fixes the alleged date of an offense, it is reversible error for the State to rely on a broader range of dates if doing so deprives the defendant of the ability to substantiate an alibi defense. State v. Brown, 35 Wn.2d 379, 382-83, 213 P.2d 305 (1949); State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963).

However, the State need not fix a precise time for the commission of a crime:

We are now constrained to approve the rule that the State need not, by election, fix a precise time for the commission of an alleged crime, when it cannot intelligently do so. In such case, the defendant will be afforded sufficient time to defend himself and substantiate his defense of alibi. Assignment of error will support a reversal, if, and when, too flexible an application is prejudicial to a defendant. Each case of necessity must rest on its own bottom.

Pitts, 62 Wn.2d at 299.

In an alibi defense, a defendant presents evidence indicating that he or she was at a different place at the time the crime was committed. State v. Johnson, 19 Wn. App. 200, 205, 574 P.2d 741 (1978). This is done in order to cast doubt upon the prosecution's assertion that the defendant was present at the time the crime was committed. Id.

Here, Mr. Moe asserts that the evidence fixed the time period in which the offenses occurred to within the month of July, based upon the testimony of the alleged victim. Further, since he had undisputed evidence that he was incarcerated from the end of June through August 8, 2011, he claims that the trial court erred in finding that the offenses instead occurred during the summer of 2011.

Here, it is clear that A.M. exhibited some difficulty in describing when the incidents occurred. However, on direct examination he did testify that they occurred in the summer of 2011, and it was only after further questioning by the prosecutor that he allowed that they happened shortly after the Fourth of the July, then during the month of July. The trial court, being in a position to closely observe A.M.'s testimony, took care to memorialize its conclusion that A.M. was credible when describing *what* had happened, but his ability to describe time frames was impaired, and further, he was sometimes confused by the questions asked of him.

Thus, applying the standard set forth in Pitts and the other authorities cited, the time fixed by the evidence, based upon the testimony of A.M., is that the events occurred sometime in the summer of 2011. Mr. Moe was entitled to present his alibi defense, but his alibi only accounted for a portion of the summer, and, it should be noted, only a portion of the charging period set forth in the charging document. The court was persuaded beyond a reasonable doubt that the crimes were committed during the broader time frame. Since that time frame was supported by the alleged victim's own testimony, the court did not deprive Moe of his right to present an alibi defense.

2. The State concedes that there was insufficient evidence to support the court’s finding of guilt on Count 2.

The elements of indecent exposure are as follows:

(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. The act of breastfeeding or expressing breast milk is not indecent exposure.

...

(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.

...

RCW 9A.88.010.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court

must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

An appellate court reviews a trial court's decision following a bench trial for whether substantial evidence supports any challenged findings of fact and whether the findings of fact support the conclusions of law. State v. Hovig, 149 Wn. App. 1, 8, 202 P.3d 318, *review denied*, 166 Wn.2d 1020 (2009), *cited in* State v. Gower, ___ Wn. App. ___, 288 P.3d 665, 670 (2012).

Moe is correct that Washington courts have interpreted the phrase "open and obscene exposure of his or her person", to mean an exposure of the genitals. State v. Dennison, 72 Wn.2d 842, 846, 435 P.2d 526 (1967). This was reiterated more recently in State v. Vars, 157 Wn. App. 482, 491, 237 P.3d 378 (2010), *citing* State v. Galbreath, 69 Wn.2d 664, 668, 419

P.2d 800 (1966); State v. Eisenshank, 10 Wn. App. 921, 924, 521 P.2d 239 (1974).

In Vars, the Court of Appeals did clarify that while RCW 9A.88.010 “requires an exposure of genitalia in the presence of another, it does not mean that the other person must observe the defendant’s private parts for an indecent exposure to have occurred.” Vars, 157 Wn. App. at 491, *citing* People v. Carbajal, 114 Ca. App. 4th 978, 986, 8 Cal. Rptr. 3d 206 (2003).

In that case, the defendant was observed by witnesses walking on the streets of Kirkland, “completely nude” but for his shoes. The witnesses saw the defendant’s bare buttocks, but not his genitalia. As officers approached the defendant, he was pulling on pants, but through a tear in one of the legs, they could see that he was not wearing underwear. Vars, 157 Wn. App. at 487-88.

Relying upon Vars and the other cases cited, it is apparent that while it is not necessary under Washington law that an indecent exposure of genitals be observed, an open exposure of buttocks, by itself, is not sufficient to support a conviction for indecent exposure. The trial court here was incorrect in concluding otherwise, and there was no finding that Mr. Moe made an open and obscene exposure of his genitals.

While A.M. observed Moe pull his shorts and boxers down, he does not describe whether they were pulled down enough to openly expose the genitals. In any event, the court's findings do not support its conclusions on Count 2.

3. The State concedes that the court's finding that Moe had the current or future ability to pay legal financial obligations should be struck.

The State concedes that the trial court did not consider Moe's ability to pay his legal financial obligations before finding, contained in the judgment and sentence, that he did have that ability.

This is clearly erroneous under State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), *citing* State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991). As a result, that portion of the disposition order must be struck on remand, and collections efforts precluded.

Under Bertrand, however, the State is not prevented from initiating future judicial proceedings in order to determine whether he has the ability to pay his obligations at that time. Bertrand, 165 Wn. App. at 405.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction and disposition entered on Count 1, dismiss Count 2 upon remand, and strike the court's findings on legal financial obligations unless the court determines Mr. Moe has the present or future ability to pay those obligations.

Respectfully submitted this 14th day of February, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via U.S. Mail, and upon the Appellant in care of his counsel

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Charles Moe
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Dated at Yakima, WA this 14th day of February, 2013.

/s/ Kevin G. Eilmes