COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1426-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

CURLEY, J. Tony M. Smith appeals from a judgment convicting him of lewd and lascivious behavior contrary to § 944.20(2), STATS. (1993-94), following a jury trial. He argues that the State failed to prove an essential element of the crime, that he committed this crime "publicly." He also argues that he cannot be charged with the crime of lewd and lascivious behavior because Milwaukee County Correctional Officer Dorothy Knott was under a duty to

observe him in her capacity as a correctional officer. Because the record supports the jury's finding that Smith exposed his genitals publicly, and because Smith's conduct is not privileged under the law, the judgment of conviction is affirmed.

I. BACKGROUND.

On September 11, 1996, Smith was a prisoner housed at the Milwaukee County House of Correction, and was confined to a solitary confinement cell. Knott testified that she went to Smith's cell to deliver some medication to him when she witnessed Smith make a gesture towards her regarding her breasts. After Knott's attention was momentarily diverted by another prisoner, she looked back at Smith, heard him say "I've got something for you," and observed that his pants were undone and that his penis was exposed, "practically" hanging out of the cell. Smith was charged with lewd and lascivious behavior for publicly and indecently exposing his genitals, contrary to § 944.20(2), STATS. (1993-94). He was convicted by a jury of lewd and lascivious behavior, criminal damage to property, and habitual criminality.[1] Following his conviction, Smith brought a postconviction motion which was denied.

II. ANALYSIS.

Standard of Review

When a defendant challenges the sufficiency of the evidence underlying his conviction, this court is obligated to review the evidence to see if "any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," ***State v.***

[1] The conviction for criminal damage to property is not on appeal.

Petrone, 166 Wis.2d 220, 226, 479 N.W.2d 212, 214 (Ct. App. 1991) (citing ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990)), and if, indeed, a review of the evidence provides such inferences, then this court "may not overturn the verdict." ***Id.***

Smith argues that the evidence presented at trial was insufficient to convict him of the crime of lewd and lascivious behavior because the State is required to prove that the indecent act took place "publicly." Section 944.20(2), STATS. (1993-94), defines lewd and lascivious behavior as: "Publicly and indecently expos[ing] genitals or pubic area."

Smith claims that it is undisputed that the events took place while he was in a solitary confinement cell, thus, the crime could not have been committed "publicly." Smith concedes that "publicly" does not mean in a "public place," but he asserts, relying on ***Reichenberger v. Warren***, 319 F. Supp. 1237 (1970), that in order to commit the crime of lewd and lascivious behavior in a private place, the indecent sex act must either be observed by a child or by a "casually observing adult." Smith asserts that Knott was not a "casually observing adult." As authority for this contention, Smith points to the definition of "casual" found in BLACK'S LAW DICTIONARY which defines "casual" as "Occurring without regularity, occasional; impermanent, as employment for irregular periods. Happening or coming to pass without design and without being foreseen or expected; unforeseen; uncertain; unpremeditated." BLACK'S LAW DICTIONARY 218 (6th ed.). He extrapolates that Knott's presence in the jail falls outside the definition of a "casually observing adult" because she witnessed his indecent act in her capacity as a correctional officer and thus, her presence was not casual as that word is defined in the dictionary. He also argues that, given the construction of a solitary confinement cell, correctional officers should expect to see the genitalia of

prisoners as the cells contain unobstructed toilets and often jail staff observe the prisoners without the inmates' knowledge. Thus, he argues that seeing the exposed genitals of inmates is a part of the officers' duties and cannot be the subject of a criminal offense.

Smith relies principally on the ***Reichenberger*** case for his first argument. There, a suit was commenced in federal court asking the court to declare Wisconsin's lewd and lascivious behavior statute unconstitutional. In determining that the statute was constitutional and not overbroad, the federal court found that the application of the statute, to be constitutionally permissible, had to be limited in its application to the goals of protecting children from exposure to obscenity and preventing assaults on the sensibilities of unwilling adults in public. ***Reichenberger***, 319 F. Supp. at 1238. The term "casually observing adult" is found nowhere in the opinion and apparently is the product of defendant's faulty distillation of the decision. Thus, Smith's analysis culminating in his conclusion that he cannot be charged with the crime of lewd and lascivious behavior because Knott was not a "casually observing adult" is totally without support.

The jury instruction for lewd and lascivious behavior, and similar statutes, also do not support Smith's argument that the State failed to prove that Smith "publicly" exposed his genitals. WIS J I—CRIMINAL 1544, defining the crime of lewd and lascivious behavior, includes a definition of "publicly." It reads: "'Publicly' means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons." This definition of "publicly" in the jury instruction is similar to that found in § 944.17, STATS., which outlaws engaging in sexual gratification in public. This statute defines "in public" to mean "in a place where or in a manner such that the person knows or has reason to know that his or her conduct is

observable by or in the presence of persons other than the person with whom he or she is having sexual gratification." Section 944.17(1), STATS. In applying both definitions, the facts presented at trial support the jury's contention that Smith exposed his genitals publicly. As noted, Smith engaged Knott in conversation and made a gesture concerning her breasts. He also stated to Knott, while exposing his penis, "I've got something for you." Later, when Knott advised Smith that she was going to report his conduct, Smith commented that she should not forget to say "how big my dick is." These facts demonstrate that Smith was well aware of Knott's presence and that he had reason to believe that she could observe his conduct and hear his comments. Thus, Smith's actions were committed "publicly."

Smith's second argument is that he should not be charged with the crime of lewd and lascivious behavior because Knott observed his genitals in her official capacity as a correctional officer. This argument also fails. Smith's argument that Knott was under a duty to observe him, thus making her observation of his genitals both voluntary and intentional, is belied by the circumstances presented here. Knott did not witness Smith's genitals during the course of routine prisoner surveillance, nor did Smith expose his penis when using the bathroom facilities or by accident.[2] Rather, Smith placed his penis "practically" outside his cell at a time when Knott was administering medication to him. Her presence was not a surprise to Smith. Further, Smith made a gesture to Knott concerning her breasts and, while exposing his penis, stated, "I've got something for you." Contrary to his argument, Smith's conduct of intentionally, indecently and

[2] It may be possible that Smith would have a valid defense if Knott witnessed Smith's genitals when Smith was unaware of her presence or if he accidentally exposed his genitals in her presence.

publicly exposing his genitals is not privileged under the law simply because of Knott's status as a correctional officer.

Inasmuch as the record supports the jury's finding that when Smith exposed his sex organ he did so indecently and publicly, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.