

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF ROSEVILLE,

Plaintiff-Appellee,

v

EDWARD STROSS,

Defendant-Appellant.

UNPUBLISHED

November 10, 2009

No. 271764

Macomb Circuit Court

LC No. 2005-000694-AR

ON REMAND

Before: Murphy, P.J., and Gleicher and Stephens, JJ.

PER CURIAM.

A jury convicted defendant Edward Stross of violating the terms of a variance to plaintiff City of Roseville’s sign ordinance. Roseville averred that a mural painted by defendant on a building had breached two variance prohibitions: one against depictions of “private parts (genitalia),” and another forbidding lettering. This Court previously rejected defendant’s assertion that the genitalia restriction infringed on his First Amendment-protected exercise of free speech, but found that the lettering ban did amount to “an unconstitutional regulation of speech, infringing on defendant’s First Amendment protections.” *City of Roseville v Stross*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2008 (Docket No. 271764), slip op at 5. However, our Supreme Court reversed on the ground that defendant had untimely challenged the constitutionality of the variance, and remanded to us for consideration of defendant’s remaining appellate contentions. *City of Roseville v Stross*, 482 Mich 979; 755 NW2d 187 (2008). We again find reversal required.

In a previously unaddressed appellate issue, defendant maintains that we must reverse the jury’s guilty verdict because we cannot determine on which of two theories it rested. According to defendant, the instructions permitted the jury to find him guilty either on the basis that he (1) ignored the variance lettering restriction, a legally cognizable or proper theory, or (2) incorporated breasts into the mural, a legally unfounded theory of guilt given that breasts plainly do not constitute “genitalia.” In defendant’s estimation, “[b]ecause it is impossible to tell whether the jury predicated criminal liability on the lettering or the display of breasts, a legally inadequate theory, the conviction can not stand.” Defendant’s challenge to the legal support for his verdict, in light of undisputed underlying facts, involves a legal question that we consider de novo. *People v Martin*, 271 Mich App 280, 286; 721 NW2d 815 (2006), aff’d 482 Mich 851 (2008).

The prosecution charged that defendant's mural violated his variance to Roseville's sign ordinance in two distinct respects. First, the prosecution claimed that defendant painted the word "LOVE" on the mural, despite that a variance granted by Roseville's zoning board of appeals specifically prohibited "lettering." Second, the prosecution asserted that defendant's mural contravened the variance restriction, "No private parts (genitalia) are exposed." Before trial commenced, defense counsel requested that the court give the jury a verdict form that distinguished between the two charged variance violations. Defense counsel pointed out, "I don't think that a general finding of guilty is going to help us in other words because it could, I'm not saying that it would, but it could well lead to further litigation to determine in fact what ... is a violation and what isn't a violation here." The prosecution advocated for a simple finding of guilty or not guilty. The trial court ruled for the prosecution, reasoning, "And I think frankly, gentlemen, that when these perimeters [sic] were issued by the Council that it was to be as a whole and not as to one or the other." At the close of proofs, defense counsel reiterated his objection to the verdict form. The jury ultimately returned a general verdict of guilt.

This Court's prior opinion in this case included the following about the genitalia charge: "We note that the mural did not contain genitalia under the plain meaning of that term. *Random House Webster's College Dictionary* (2001) defines 'genitalia' as 'the organs of reproduction, esp. the external organs.' Because breasts are not reproductive organs, they are not properly considered genitalia." *City of Roseville, supra* slip op at 4 n 5. The Court further held that Roseville's preclusion of lettering on the mural infringed on defendant's constitutional rights, explaining that "[b]ecause the jury was permitted to convict defendant based on the unconstitutional provision prohibiting lettering, his conviction must be reversed." *Id.* at 5. Although the Supreme Court reversed our holding regarding the unconstitutionality of the lettering prohibition, the Supreme Court did not criticize or even reference our ruling that the breasts depicted in the mural did not constitute "genitalia" that would violate the variance terms. Given the Supreme Court's unconditional reversal of this Court's prior decision, it appears questionable whether the law of the case doctrine applies with respect to this Court's prior "genitalia" definition. See *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988) ("Where a case is taken on appeal to a higher appellate court," "[r]ulings of the intermediate appellate court . . . remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination."). But even assuming this Court's prior "genitalia" definition does not technically constitute the law of the case, in light of the absence of any Supreme Court criticism or disparagement of this Court's "genitalia" definition, and the fact that neither the Roseville ordinance nor defendant's variance specifically defines the term "genitalia," we readopt as persuasive the definition set forth in *Stross*, slip op at 4 n 5. See *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006) (explaining that if an ordinance or statute does not contain internal definitions, a court may resort to dictionary definitions in attempting to ascertain plain and ordinary meaning).

Uncontroverted evidence established that defendant depicted breasts in the mural, which conduct the trial court incorporated as a basis for the jury to find defendant guilty of violating his variance to Roseville's sign ordinance. But Roseville may not prosecute defendant for a breast-related ordinance variance violation because *as a matter of law*, breasts do not constitute "genitalia." Alternatively stated, defendant's prosecution for violating the variance's genitalia proscription did not comport with the law, and thus no legal basis existed on which to prosecute defendant for the mural's depiction of breasts, irrespective whether adequate evidence might

have supported defendant's conviction on this ground. Michigan has adopted a common-law, judge-made rule mandating reversal when a jury renders a verdict premised in part on an improperly submitted theory. "[A] general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it." *Sahr v Biedt*, 354 Mich 353, 365; 92 NW2d 467 (1958), quoting Sunderland, *Verdicts, general and special*, 29 Yale L J 253, 259 (1920). This Court most recently reiterated the rule in *Tobin v Providence Hosp*, 244 Mich App 626, 645; 624 NW2d 548 (2001). In *Tobin*, the Court reversed a general verdict because one theory of medical malpractice liability submitted to the jury lacked evidence of proximate causation: "Because the jury was not asked to make a distinct determination with respect to each theory of malpractice alleged by plaintiff, it is impossible to know if the jury rejected the other theories advanced by plaintiff and rendered judgment based on this improperly submitted theory." *Id.*

Michigan's appellate courts have also applied the rule of automatic reversal in criminal cases. In *People v Huffman*, 315 Mich 134, 136; 23 NW2d 236 (1946), the Supreme Court framed the "principal question presented" as "whether or not the trial judge erred in receiving a general verdict of 'guilty as charged.'" In that case, the information charged the defendant with two counts: feloniously breaking and entering a store building at night with the intent to commit larceny, and larceny from the store. *Id.* at 135-136. The jury's general verdict did not specify on which theory it had convicted the defendant, who appealed the conviction. *Id.* at 136. The Supreme Court reviewed Michigan and out-of-state case law concerning general verdicts, and noted that "the evidence justified defendant's conviction under either or both of the counts in the information. *Id.* at 140. Nevertheless, the Supreme Court adhered "to our established rule that it was error to receive a general verdict of guilty when the two offenses charged were separate, distinct, and different in character, required substantially different evidence to establish them, and were punishable by different statutory penalties." *Id.*

In *People v Grainger*, 117 Mich App 740; 324 NW2d 762 (1982), this Court reversed the defendant's conviction for carrying a concealed weapon. The charge arose from the defendant's attempt to board a commercial aircraft with a gun concealed in his briefcase. The briefcase also contained a gun permit. *Id.* at 745-746. The prosecution submitted two theories of guilt to the jury, "(1) that defendant had an invalid permit, and (2) that defendant had a valid permit but was carrying the gun in violation of certain license restrictions." *Id.* at 754. This Court found that the first theory should not have been submitted to the jury, and that "[s]ufficient evidence was adduced to convict defendant under the prosecution's second theory." *Id.* at 754-755. Nevertheless, this Court reversed the defendant's conviction:

Where one of two alternative theories of guilt is legally insufficient to support a conviction, and where it is impossible to tell upon which theory the jury relied, the defendant is entitled to a reversal of his conviction and a new trial. Such is the case here. The second theory would support a conviction, the first would not. We cannot tell upon which theory the jury relied. [*Id.* at 755.]

Because Michigan law plainly forbids us from upholding a defendant's conviction premised on a general verdict that contains a legally erroneous theory of guilt, we must reverse

defendant's conviction and remand for a new trial on the appropriate theory of guilt. And because we must reverse defendant's conviction, we need not consider his appellate sentencing challenge.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Elizabeth L. Gleicher

/s/ Cynthia Diane Stephens