STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1653

State of Minnesota,
Respondent,

vs.

Dennis J. Pearson,
Appellant.

Filed November 18, 2008
Reversed and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 07004944

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan L. Segal, Minneapolis City Attorney, Heidi Johnston, Assistant City Attorney, Suite 300, 333 South Seventh Street, Minneapolis, MN 55402 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges his conviction of gross-misdemeanor indecent exposure, arguing that the district court committed reversible error in instructing the jury. Because the district court misstated the law in instructing the jury, we reverse and remand.

FACTS

Appellant Dennis Joseph Pearson was charged with four counts of gross-misdemeanor indecent exposure for exposing his genitals to four individuals at a strip club. The district court dismissed three of the charges before the case was submitted to the jury. Over Pearson's objection, the district court granted the state's motion to add language to the standard jury instruction on indecent exposure. The added language stated that intent to be indecent or lewd could be inferred from the fact that the act took place "in public or otherwise where it [was] reasonably certain to be observed." Pearson was found guilty. The district court denied his motion for a new trial and sentenced him to 365 days in jail. This appeal followed.

D E C I S I O N

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Jury instructions are reviewed for an abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418

N.W.2d 150, 155 (Minn. 1988). "An instruction is error if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

The elements of indecent exposure are:

> First, the defendant willfully and lewdly exposed the defendant's body or private parts. An act is willful and lewd if it was done with deliberate intent to be lewd or indecent.
>
> . . . .
>
> Second, the defendant's act took place in a public place or any place where others were present.
>
> . . . .

10 *Minnesota Practice*, CRIMJIG 12.88 (2006). Here, the district court added:

> I have used the phrase with intent. With intent to or with intent that means that the actor either has a purpose to do the thing or cause the results specified or believes that the act, if successful, will cause that result. The deliberate intent to be indecent or lewd can be inferred from the fact that the charged conduct occurs in public or otherwise where it is reasonably certain to be observed.

Pearson argues that the instruction created a permissive inference and that permissive-inference instructions are improper in Minnesota, citing *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992). In *Olson*, the supreme court noted that instructing the jury on a permissive inference may be constitutional, but nonetheless improper, and stated that, as a general rule, instructions with respect to inferences should be avoided as much as possible. *Id.* But judges may give a permissive-inference instruction if the instruction does not materially misstate the law, *State v. Kuhnau*, 622 N.W.2d at 556, and "if, considering all the evidence in a particular case, there is a rational basis for telling the

jury that it *may* infer one fact from the proof of another." *Olson*, 482 N.W.2d at 215 (citing *Ulster County Court v. Allen*, 442 U.S. 140, 163, 99 S. Ct. 2213, 2227 (1979)) (emphasis added). *See also Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S. Ct. 2450, 2454 (1979).

The state argues that the instruction accurately stated the law, citing *State v. Stevenson* for the proposition that deliberate intent to be lewd can be established by evidence that exposure occurred "in a place so public and open that it must be reasonably presumed that it was intended to be witnessed." 656 N.W.2d 235, 240 (Minn. 2003) (quoting *State v. Peery*, 224 Minn. 346, 352, 28 N.W.2d 851, 854 (1947)). The state's reliance on *Stevenson* is misplaced. First, an appellate court's holding or expression of opinion on the evidence does not necessarily make a proper jury instruction. *See State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994) (stating that a "trial court may tailor a proposed instruction to fit the facts and interpret criminal statutes in light of the common law[,]" but "a court should not alter a statutory defense merely because alternative language has appeared in judicial decisions"). Second, in this case, the district court did not use the language quoted from *Stevenson*. The district court instructed the jury that the requisite intent could be inferred merely from the fact that the charged conduct occurs "in public." We conclude that this is not an accurate statement of the law and constituted error. The law does not permit intent to be inferred merely because the conduct occurred "in public."

An erroneous instruction does not necessarily require a new trial. *Olson*, 482 N.W.2d at 216. But in this case, despite the existence of sufficient evidence to support

the guilty verdict, we are unable to say that the jury did not infer intent merely from the fact that the act took place "in public." In fact, the prosecutor made just that argument, stating: "The judge will also instruct you that the deliberate intent to be indecent or lewd can be inferred from the fact that the charged conduct occurs in a public place, in public . . . ." We conclude, as did the supreme court in *Olson*, that "[a]lthough defendant *probably* would have been convicted in any event, we cannot conclude *beyond a reasonable doubt* that he would have been convicted in any event." *Id.* Therefore, we reverse and remand for a new trial.

Reversed and remanded.