IN THE COURT OF APPEALS OF IOWA

No. 7-071 / 06-0528
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT RICHARD NEWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, District Associate Judge.

Scott Newell appeals from his conviction for indecent exposure. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Bret Lucas, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

A store employee saw Scott Newell masturbating among racks of clothing. When Newell left the store, the employee followed him out, noted the license plate number on his car, and conveyed the information to the store manager who, in turn, informed police.

The State filed a trial information against Newell. The charge was

> indecent exposure in violation of Iowa Code Section(s) 709.9, by committing a sex act in the presence of or view of David Lienemann, in order to arouse or satisfy the sexual desires of either party, and knowing, or reasonably should have known, that such an act was offensive to David Lienemann.

The case was tried to the bench and the district court found him guilty as charged.

On appeal, Newell contends the State failed to prove that: (1) Newell committed a "sex act," (2) Lienemann was offended by the act, and (3) Newell knew or should have known that the act was offensive. We need only address the second element. Our review of the district court's fact finding on this element is for substantial evidence. *State v. Rieflin,* 558 N.W.2d 149, 151-52 (Iowa 1996).

The State was required to prove more than the general offensiveness of the conduct. According to case precedent, the State was required to prove that "[t]he viewer," in this case Lienemann, "was offended by the conduct." *State v. Adams*, 436 N.W.2d 49, 50 (Iowa 1989); *State v. Bauer*, 337 N.W.2d 219, 212 (Iowa 1983). The State concedes Lienemann did not testify he was offended by Newell's conduct. The State argues, however, that

> [t]he fact that Lieneman[n] conducted his own investigation to assist the police in apprehending defendant shows that [Lienemann] was not a willing observer of defendant's conduct and was sufficiently offended by it that he wanted to ensure that defendant was apprehended and, presumably, prosecuted.

The State's argument requires a reasonable fact-finder to read too much into Lienemann's decision to record Newell's license plate number. *See State v. Leckington*, 713 N.W.2d 218, 221 (Iowa 2006) ("[e]vidence that only raises suspicion, speculation, or conjecture is not substantial"). Lienemann's decision does not amount to substantial evidence supporting the district court's finding that Lienemann was offended by Newell's sex act. As the State did not prove this element, we set aside Newell's conviction.

REVERSED AND REMANDED.

Eisenhauer, J. concurs, and Vogel, P.J. concurs specially**.**

VOGEL, J., (concurring specially)

Because we are bound by stare decisis I must concur. However, it is my belief that our case law has gone beyond the legislature's intent in interpreting Iowa Code section 709.9. *See ABC Disposal Sys. Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004) ("In interpreting a statute, our goal is to determine the legislature's intent when it enacted the statute").

In 1974, the former indecent exposure statute was found unconstitutionally vague in *State v. Kueny*, 215 N.W.2d 215, 218-19 (Iowa 1974). As a response, in 1976 our legislature promulgated the current statute. *See* 1976 Iowa Acts ch. 1245, § 909. This statute, as codified at Iowa Code section 709.9, has remained essentially unchanged[1] since its original enactment, and provides:

> A person who exposes the person's genitals or pubes to another not the person's spouse, or who commits a sex act in the presence of or view of a third person, commits a serious misdemeanor, if:
>
> 1. The person does so to arouse or satisfy the sexual desires of either party; and
> 2. The person knows or reasonably should know that the act is offensive to the viewer.

Iowa Code § 709.9 (2005).

One commentator, who interpreted this statute shortly after it became effective in 1978, concluded the crime of indecent exposure contained the following three elements:

> The actus reus of the revised crime can consist, in the alternative, of either (1a) exposure of one's genitals or pubes to another person other than one's spouse or (1b) commission of a "sex act" in the presence or view of a third person; with the additional dual mens

[1] *See* 1977 Iowa Acts ch. 147, § 13 (substituting "the" for "his" preceding "act" in subsection 2).

> rea elements of both (2) intending to arouse or satisfy the sexual desires of either party *and* (3) knowing (or having reasonable basis for knowing) that such conduct is offensive to the viewer.

Kermit L. Dunahoo, *The New Iowa Criminal Code: Part II,* 29 Drake L. Rev. 491, 540-542 (1979-80) (emphasis supplied by Dunahoo). This commentary was relied upon in the 1983 case of *State v. Bauer,* the first decision interpreting the substantive requirements of the new statute. *See State v. Bauer*, 337 N.W.2d 209 (Iowa 1983). However, in *Bauer,* a fourth element, that the victim be offended, was added:

> The offensiveness standard is the third element of the crime and requires the State to show the state of mind of both the actor and the victim-viewer. It must be shown that the viewer was offended by the conduct. It must also be shown that the actor knew, or under the circumstances, should know the viewer would be offended.

Id. at 212. Moreover, in 1989, this language was reiterated:

> Although we sometimes list them as three, there are actually four elements to the crime of indecent exposure under section 709.9:
>
> 1. The exposure of genitals or pubes to someone other than a spouse, or in the alternative the commission of a sex act in the presence or view of a third person;
> 2. That the act is done to arouse the sexual desires of either party;
> 3. *The viewer was offended by the conduct;* and
> 4. The actor knew, or under the circumstances should have known, the victim would be offended.

State v. Adams, 436 N.W.2d 49, 50 (Iowa 1989) (emphasis added); *see also* I Iowa Crim. Jury Instructions 900.5 (1990); 4 Rigg, *Iowa Practice: Criminal Law* § 6.1(o), at 1169-70 (2003) (both listing the above recited elements as the required elements of indecent exposure and citing *State v. Adams* as authority).

The creation of a fourth element finds no support in the plain language of the Iowa Code section 709.9. Moreover, an examination of the legislative history

of Iowa Code section 709.9 reveals no intent on the part of the General Assembly to require the State demonstrate that the victim was actually offended by the conduct. *See* S.F. 85, 66th Gen. Assem., Reg. Sess. (Iowa 1976). Finally, even the authority cited within *State v. Bauer* falls short of supporting the formation of an element requiring proof that the victim was in fact offended. *See* Dunahoo, 29 Drake L. Rev. at 541 (providing for only three elements to indecent exposure); 4 Yeager & R. Carlson, *Iowa Practice: Criminal Law and Procedure* § 217, at 63 (1979); Model Penal Code § 213.5 (1980) (not requiring a showing of any offensiveness whatsoever, but instead requiring only that the assailant know that "his conduct is likely to cause *affront or alarm* ") (emphasis added).

Rather, the authority cited in *Bauer* supports the determination in *Bauer* that the intent of the legislature in drafting the language "knows or reasonably should know that the act is offensive to the viewer" was:

> [T]o eliminate prosecutions for willing and consensual conduct . . . [i]n these circumstances the legislature desired that no crime exist.

Bauer, 337 N.W.2d at 211 (quoting the district court's statement of the legislative intent behind Iowa Code section 709.9(2)); *see also* 4 Yeager & R. Carlson, § 217, at 63 (concluding that "only exposure with sexual motivation, inflicted upon an *unwilling viewer*" constitutes the offense of indecent exposure) (emphasis added). Thus, it appears the legislature, in mandating that a person know or reasonably should know that the "act is offensive to the viewer", never intended to require proof that a victim was actually offended. Rather, the General Assembly intended only to prevent prosecutions for willing and consensual behavior. *Id.* Therefore, in my view the State need not show that the victim was

actually offended, but instead only the statutory requirement that the person committing the act knows or should know that the act "is offensive to the viewer." *See* Dunahoo, 29 Drake L. Rev. at 541.

In this case, while there is no testimony from the store employees, particularly Mr. Lienemann, that they were "offended" by Newell's conduct, there is ample testimony that they were not willing observers. Fifteen-year-old Lienemann was merely working at the Goodwill store on the day in question when he witnessed Newell expose himself while masturbating in the store near a rack of clothes, trying to conceal his actions with clothes in his other hand. Once Lienemann made eye contact with Newell, he further tried to conceal his actions by quickly walking away. Thus, the State clearly produced testimony from Leinemann that he was not a willing participant or observer, and that Newell knew or should have known that his conduct was offensive to Lienemann. I assert that the statutory element "the person knows or reasonably should know that the act is offensive to the viewer" was proven.

Under this scenario, I would find the elements the legislature set forth in Iowa Code section 709.9 were satisfied, and would affirm the district court's adjudication, but under the current status of our case law, must concur with the majority to reverse and remand.[2]

[2] This special concurrence is reiterated from that in the unpublished case *In re C.C.*, No. 04-0120 (Iowa Ct. App. Sept. 9, 2004).