IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28521-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
MOISES L. GOMEZ,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Moises Gomez appeals his convictions on two counts of residential burglary with sexual motivation. He contends: (1) the trial court erred by denying a pretrial motion for change of venue, (2) the prosecutor misled the jury, and (3) the evidence was insufficient to sustain his convictions. We affirm the convictions.

FACTS

On January 22, 2009, Moises Gomez took a large amount of cocaine combined with hydrocodone and alcohol. He then wandered around his apartment complex. A resident let him in her apartment to use the telephone. Once inside, he asked to see the

resident's bedroom. She refused to show him her bedroom. He then asked to use the bathroom. The resident showed him the bathroom and then left the apartment to seek help from a neighbor. She returned, without help, to find Mr. Gomez in her bedroom with a comforter covering his waist. Mr. Gomez then said, "Come and look at this." The resident refused, told Mr. Gomez to leave, and again left to get help. When she returned with her neighbor, Mr. Gomez left the apartment. The resident then called the police.

Later that same day, a ten-year-old girl entered her home in the same apartment complex to find Mr. Gomez sitting in the living room with his pants down rubbing a bra up and down on his genitals. When he saw the girl, Mr. Gomez stopped the rubbing and said, "Come in." The girl ran out of the apartment and back to the car where her older sister and mother were unloading groceries. The family called the police. Police arrived and found Mr. Gomez in the same position the girl had described. He was not moving and was unresponsive; officers used a stun gun to get Mr. Gomez to comply with their demand to lie on the floor. Mr. Gomez was arrested and charged with two counts of residential burglary with sexual motivation and one count of communicating with a minor for an immoral purpose.

The news media in the Clarkston area ran accounts of Mr. Gomez's arrest and followed the procedural aspects of the case for several months. Mr. Gomez moved for a

change of venue; the motion was denied.

At trial, a psychologist testified that Mr. Gomez was likely experiencing a delirium brought about by an overdose of cocaine. He also testified that Mr. Gomez exhibited behavior that indicated he was capable of forming a basic level of intent.

During closing argument, the prosecutor stated:

> He's exposing himself. Indecent exposure is a crime against persons or property. In the [first] home, what did he do? He tried to show her what he was doing under the blanket. And again, back to the, ah — the separate crime instruction and the circumstantial evidence instruction, you can infer from the evidence of what he was doing in the [second] residence before he was interrupted to determine what was he intending to do in [the first] home when he's engaging in — leading up to that very same behavior. So, that's the issue in this case — whether or not the defendant had intent.

Report of Proceedings at 526. Mr. Gomez did not object to these statements during the trial.

The jury was not given an instruction on the elements of indecent exposure or an instruction that intent to commit a crime may be presumed by unlawful presence in a residence. The court did give a voluntary intoxication instruction.

A jury convicted Mr. Gomez on both counts of burglary with sexual motivation. It acquitted him of communication for immoral purposes. Mr. Gomez moved for a new trial based on lack of evidence of intent and comments made by the prosecutor in closing argument regarding the crime of indecent exposure. The trial court denied the motion.

Mr. Gomez was sentenced to 48 months of confinement. He then timely appealed.

ANALYSIS

Venue Change

Decisions on motions to change venue are reviewed for abuse of discretion. *State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974). Where a probability of prejudice in a given venue is shown, a venue change must be granted; actual prejudice is not required. *Id.* at 586. Criteria which courts examine in deciding venue change based on prejudicial pretrial publicity include:

> (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

Id. at 587. A court abuses its discretion when it acts on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The press in this case was not especially inflammatory. It occurred several months before trial, and there was no real difficulty in empanelling a jury that had not heard or could not remember details about the publicity. In cases with much more inflammatory

publicity, our courts have upheld denial of venue change. *See*, *e.g.*, *State v. Jackson*, 111 Wn. App. 660, 671, 46 P.3d 257 (2002) (holding no abuse of discretion to deny venue change where, during jury selection, a headline in the local paper read, "Would Father Kill Daughter for Love?"), *aff'd*, 150 Wn.2d 251, 76 P.3d 217 (2003). This record does not establish a probability of prejudice justifying a change of venue.

Mr. Gomez also alleges that the trial court's statement that he had "failed to uphold his burden" to prove he could not receive a fair trial in Asotin County demonstrates abuse of discretion. Clerk's Papers (CP) at 100. While it is true that this is the wrong legal standard, the motion failed even under the more lenient standard of probable prejudice. In addition, the court specifically stated the motion could be renewed if problems developed during jury selection. CP at 101. Mr. Gomez did not renew his motion. There was no difficulty empanelling a jury. The court did not abuse its discretion in denying the venue change motion.

Prosecutor's Argument

"To prevail on a claim of prosecutorial misconduct, a defendant must show," (1) "the prosecutor's comments were improper," and (2) "the comments were prejudicial." *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). "Failure to object to an improper comment constitutes waiver of error unless the

comment is so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice." *State v. Classen*, 143 Wn. App. 45, 64, 176 P.3d 582, *review denied*, 164 Wn.2d 1016 (2008). In analyzing prejudice, the comments are not examined in isolation; rather, the entire context of the trial is considered, including the evidence and instructions to the jury. *Warren*, 165 Wn.2d at 28.

In the present case, Mr. Gomez did not object to the comments at the time they were made. While it is true that in his own closing remarks, Mr. Gomez did suggest that the prosecutor's arguments were contrary to the jury instructions, he did not seek a ruling from the court or any curative instruction. The comments were not so prejudicial that a curative instruction would not have been effective. Thus, the issue is waived.

Even if we were to consider Mr. Gomez's argument on this issue, he has failed to demonstrate that the comments were sufficiently prejudicial to merit a new trial. It is true that the prosecutor did make a factual misstatement. There was no evidence that Mr. Gomez exposed himself. However, as the full context of the prosecutor's argument makes clear, there was circumstantial evidence to support the notion that Mr. Gomez intended to expose himself. The State is not required to prove that Mr. Gomez committed or intended to commit a particular crime; intent to commit some crime is sufficient. *See State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). Indecent exposure was an

example of a crime that Mr. Gomez may have intended to commit. The prosecutor did not misstate the law regarding indecent exposure; the prosecutor simply said exposing oneself is a crime. In context, the prosecutor clearly meant exposing genitalia, an action that meets the definition of indecent exposure. *See* RCW 9A.88.010; *State v. Dennison*, 72 Wn.2d 842, 846, 435 P.2d 526 (1967). Thus, despite the brief factual misstatement, the prosecutor did not commit misconduct, and even if he had, it did not rise to the level of prejudicial error justifying a new trial.

Sufficiency of Evidence

"To determine whether the evidence is sufficient to sustain a conviction, [appellate courts] view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other

than a vehicle." RCW 9A.52.025. The intent to commit a specific crime is not a required element of burglary. *Bergeron*, 105 Wn.2d at 4. Rather, intent to commit any crime against a person or property inside the burglarized premise is all that is required. *Id.*

A person acts with sexual motivation when one of the purposes of the crime is to achieve personal sexual gratification. RCW 9.94A.030(46).

There was no dispute in this case that Mr. Gomez remained unlawfully in one apartment and entered another apartment unlawfully. He asserts that there was insufficient evidence to suggest that he intended to commit any other crimes. This argument ignores his actions while in the apartments. In both apartments he exhibited behavior which suggested he was sexually aroused and intended to share his arousal with others. This is sufficient evidence to suggest intent to commit, at a minimum, indecent exposure. The evidence also suggests that he entered the apartments with the intention of sexually gratifying himself. Thus, the evidence was sufficient to support the convictions.[1]

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

[1] The issues Mr. Gomez raises in his Statement of Additional Grounds for Review have either been addressed above or were mere allegations with no support in the record. We decline to review the unsupported allegations. *See* RAP 10.10(c).

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

_____
Kulik, C.J.

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Brown, J.