IN THE COURT OF APPEALS OF IOWA

No. 1-326 / 10-0859
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL LOUIS KLEMME,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton, District Associate Judge.

Defendant appeals from his conviction and sentence for indecent exposure. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Robert C. Bradfield, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, Daniel Louis Klemme, appeals from his conviction and sentence for indecent exposure in violation of Iowa Code section 709.9, 901A.2(2), 901A.2(8), 903B.2 (2009). Klemme claims no rational juror could have found proof of guilt beyond a reasonable doubt, the district associate judge lacked subject matter jurisdiction, he was denied statutory rights in the jury selection procedure, and his sentence constitutes cruel and unusual punishment as applied to him. We affirm.

I. BACKGROUND AND PROCEEDINGS. In the evening of November 3, 2009, Chelsea Conger and her boyfriend, Joshua Hepner, were babysitting at a home located diagonally across the street from Klemme's home. While watching a movie in the living room with a three-year-old child, Hepner glanced out the front window of the home and observed Klemme masturbating in front of his window. Hepner asked Conger what Klemme was doing. Conger looked out the window to see Klemme standing in front of his window "with his penis in his hand, masturbating with it." Conger contacted the police and continued to observe Klemme through the window. When Klemme stopped, Conger and Hepner observed Klemme pull up his underwear and his pants, before sitting down in his living room. When the police arrived, Klemme went in his bedroom and refused to answer the door. An officer observed Klemme there with scissors in his chest. The officer contacted medical personal and then forcibly entered Klemme's home. Klemme was taken to the hospital to address his injury. While he was there, officers questioned him about the incident.

Klemme denied masturbating and asserted that he wanted to die because he was sick of going to jail for something he did not do.

The State filed a trial information on December 15, 2009, charging Klemme with indecent exposure. The trial information also contained a notice of sentencing enhancement asserting Klemme was subject to the enhanced sentencing provisions of Iowa Code sections 901A.2(2), 901A.2(8) and 903B.2 because he had been convicted of two or more sexually predatory offenses. The prior convictions listed on the notice occurred August 6, 1991, and September 13, 1989.[1]

The case was tried to the jury on March 22, 2010. Prior to the start of the trial, Klemme stipulated to his prior convictions. At the close of the State's case, Klemme moved for a judgment of acquittal asserting the State failed to prove he committed an overtly public act. Klemme claimed the neighbors should not be allowed to look through his windows and then complain about what they see. In addition, Klemme challenged whether the neighbors were offended by what they saw because they testified they continued to look in his windows until the police arrived. Klemme asserted the viewing was not the unwilling exposure contemplated by the statute, but intentional and voyeuristic. Klemme also alleged the State failed to prove that neither Conger nor Hepner was his spouse. The court overruled the motion finding there was sufficient evidence to make a prima facie case of indecent exposure. The court found the statute did not require a person be in a public place to be convicted of indecent exposure and

[1] We also note Klemme was convicted of indecent exposure on August 18, 1988 and July 8, 2003, making this his fifth conviction for indecent exposure.

the evidence in the case was sufficient to demonstrate Klemme wanted to be seen. The court further found testimony Klemme was masturbating was sufficient to satisfy the requirement Klemme had the specific intent to arouse or satisfy his sexual desires. In addition, the court concluded there was sufficient evidence to prove neither Conger nor Hepner was Klemme's spouse.

The jury found Klemme guilty of the charge of incident exposure. On May 7, 2010, Klemme filed a motion for new trial asserting the district associate judge did not have subject matter jurisdiction over his case because of the enhanced sentence and he was entitled to felony jury selection procedures. He also asserted the verdict was contrary to the weight of the evidence.

The case proceeded to sentencing on May 14, 2010. The court first addressed Klemme's motion for a new trial finding it did have subject matter jurisdiction over the case and Klemme was not entitled to felony jury selection procedures because the sentence enhancement did not change the classification of the crime from a serious misdemeanor. The court also found, based on its review, the weight of the evidence supported the jury verdict.

At sentencing Klemme argued the mandatory sentences were cruel and unusual as applied to him under *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009). In Klemme's case, the enhancements resulted in a penalty eight-and-a-half times what he would have received for a serious misdemeanor. The two prior convictions relied on for the enhancement of his sentence occurred almost twenty years before the current conviction. These factors, in addition to his physical impairments and neurologic injury from a motorcycle accident occurring

in 1982, created a situation where the enhanced sentence amounted to cruel and usual punishment as applied to him; and therefore, Klemme urged the court to forego sentencing him on the enhancement.

The court determined the statutory sentencing scheme was mandatory and considering Klemme's criminal history, the sentence was not grossly disproportionate to punishment. The court gave consideration to the fact Klemme has a history of violent offenses including harassment and trespassing in addition to the other indecent exposure convictions. The court sentenced Klemme to a term of incarceration not to exceed ten years pursuant to Iowa Code section 901A.2(2). Because the sentence cannot be reduced more than fifteen percent, Klemme is required to serve eighty-five percent before being eligible for parole. Klemme was also sentenced to an additional term of parole not to exceed two years under Iowa Code section 901A.2(8). In addition, Klemme was sentenced to a special sentence of an additional term not to exceed ten years under the supervision of the Department of Corrections. Iowa Code § 903B.2.

II. SUFFICIENCY OF THE EVIDENCE. Klemme first claims "the State's evidence suffers from factual and legal defects such that no rational juror could find proof of guilt beyond a reasonable doubt." While this argument is unclear, we consider this a sufficiency-of-the-evidence claim. Klemme asserts there is no proof of actual exposure, and even if there was exposure, there is no evidence he intended to expose himself.

We review sufficiency-of-the-evidence claims for correction of errors at law and the verdict is binding on us on appeal if it is supported by substantial evidence. *State v. Isaac*, 756 N.W.2d 817, 819 (Iowa 2008). Evidence is substantial if, when viewed in the light most favorable to the State, it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). We consider all evidence, not just inculpatory evidence, and if the evidence only raises suspicion, speculation, or conjecture, it is not substantial. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

The crime of indecent exposure has been broken down into four elements. The elements include,

> 1. The exposure of genitals or pubes to someone other than a spouse;
> 2. 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.

Jorgensen, 758 N.W.2d at 834. Klemme challenges the first element in two ways. First, he asserts there was no evidence to support actual exposure. Secondly, he contends there is no evidence to support he intended for others to see him.

With respect to the first argument, we find there is sufficient evidence from which a jury could conclude Klemme actually exposed his genitals. Conger testified she saw Klemme "standing in his window, kind of to the side, with his penis in his hand, masturbating with it." Hepner also testified he saw Klemme masturbating, "right in the front of the window" with "every light in his kitchen and

living room . . . on." Klemme claims Hepner could not have seen his penis because he testified he saw Klemme silhouetted in the light. However, Hepner testified Klemme turned slightly to the left giving Hepner a "perfect view." In addition, both Hepner and Conger testified they saw Klemme pull up his underwear and pants once he stopped masturbating. With this evidence, a rational trier of fact could have reasonably concluded both Conger and Hepner saw Klemme's genitals.

Klemme's appellate brief focuses on the angle the witnesses had in observing him and the distance between the houses. He asserts it is unlikely they could have seen what they claim to have seen. Klemme urges us to "weigh the evidence" and to "consider the credibility of the witnesses." However, Klemme appears to be confusing a challenge to the sufficiency of the evidence with a challenge to the weight of the evidence.

When we review a case for the sufficiency of the evidence, we do not consider the credibility of the witnesses or weigh the evidence.[2] *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Only under a weight-of-the-evidence claim can a court consider these issues. *Id.* Even if we were to consider this case as a weight of the evidence claim,[3] our appellate review is limited to considering

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[2] We do recognize there are limitations to the general rule that the credibility of witnesses is left to the jury under a sufficiency-of-the-evidence claim. *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). There are rare cases where a witness's testimony is so "impossible, absurd, and self-contradictory that the court should deem it a nullity." *Id.* This is not one of those rare cases.

[3] Klemme did make a motion for a new trial based on the weight of the evidence under Iowa Rule of Criminal Procedure 2.24(2)(*b*)(6) and the trial court denied this motion at the sentencing hearing. Thus, this issue was properly preserved for our review, but not raised by Klemme in his brief.

whether the trial court abused its discretion determining whether the verdict is supported by the weight of the evidence. *Id.* at 203. We do not delve into the underlying question of whether the verdict is against the weight of the evidence, but simply look to see if the district court's determination of the issue is clearly untenable or unreasonable. *Id.* In this case, we cannot say the trial court abused its discretion in denying Klemme's motion for a new trial on the basis of the weight of the evidence.

Klemme's second argument is, though there may have been actual exposure, he did not intend to expose himself. Instead, he asserts he was in the privacy of his own home, standing a couple of feet back from and to the side of the window. Thus, Klemme concludes there is no likelihood he could have expected someone to see him. However, we have said, "Being in one's home does not insulate a person from criminal liability for indecent exposure." *State v. Blair*, ___ N.W.2d ___, ___ (Iowa Ct. App. 2011). Conger and Hepner both testified it was starting to get dark outside and all the lights in Klemme's kitchen and living room were on and Klemme was standing facing a window having no blinds or draperies. Just as we held in *Blair*, a person facing forward in front of a window while masturbating has to be aware of his surroundings and "knows or ought to know, his act is open to the observation of others." *Id.*

Despite the distance between the two houses and the angle at which Conger and Hepner observed Klemme, we find there was sufficient evidence from which the jury could conclude Klemme exposed his genitals to persons other than his spouse. *Jorgensen*, 758 N.W.2d at 834.

III. SENTENCE ENHANCEMENT. Klemme's next assignment of error is that the sentence enhancements applicable to his case took the matter outside the subject matter jurisdiction of the district associate judge and he should have been allowed to strike six jurors not just four. Klemme claims because he faced a potential punishment of incarceration for up to ten years, the charge was no longer a serious misdemeanor, but was a class "C" felony. Our scope of review on this issue is for correction of errors at law. Iowa R. App. P. 6.907.

We recently had the opportunity to address the subject matter jurisdiction of a district associate judge where a sentence enhancement was applied. *State v. Bartley*, ___ N.W.2d ___, ___ (Iowa Ct. App. 2011). In *Bartley*, the defendant was charged with a third offense of operating while intoxicated and the State gave notice of its intent to use two prior felony convictions to enhance the sentence of the current offense from five years to fifteen years under the habitual offender statute. *Id*. at ___. The defendant asserted the district associate judge did not have subject matter jurisdiction to preside over the case because of the sentence enhancement. *Id*. at ___. We found the district associate judge did have jurisdiction because Iowa Code section 602.6306(2) was clear and unambiguous in giving district associate judges jurisdiction over all class "D" felonies and did not make a distinction based on the potential sentence that could be assessed. *Id.* at ___. We concluded the jurisdiction granted to district associate judges over class "D" felonies, included the ability to sentence those convicted of such an offense "in whatever manner the Code provides." *Id*. at ___.

Similarly here, Iowa Code sections 901A.2 and 903B.2 provide for an enhanced penalty for sexually predatory offenses. These provisions do not create a separate crime, but "more severely punish those incorrigible offenders who have not responded to the restraining influence of conviction and incarceration." *Id.* at ___. In granting the district associate judge jurisdiction under Iowa Code section 602.6306(2), the legislature said, "District associate judges also have . . . jurisdiction of indictable misdemeanors." The legislature did not restrict this jurisdiction based on the potential sentence the defendant faced and neither shall we. We find district associate judges have jurisdiction to preside over all indictable misdemeanors including the ability to sentence those convicted of indictable misdemeanors in accordance with the Code.

Klemme also asserts he should have been allowed six peremptory strikes during jury selection instead of four because the sentence enhancements changed the classification of the crime to a felony. *See* Iowa R. Crim. P. 2.18(9) (providing those charged with a felony other than a class "A" felony shall receive six strikes and those charged with a misdemeanor shall receive four). As we stated above, the sentence enhancements do not create a separate crime. *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000). One cannot be charged with violating Iowa Code section 901A.2 or 903B.2. *See State v. Smith*, 291 N.W.2d 25, 27 (Iowa 1980) (finding being an habitual offender is not a criminal offense, and no one can be convicted of violating the habitual offender statute). The only crime charged in this case was a serious misdemeanor. *See* Iowa Code § 709.9. Iowa Rule of Criminal Procedure 2.18(9) bases the number of jury strikes allowed

on the crime charged. Enhancing the sentence a defendant faces, because he is a repeat offender, does not alter the classification of the underlying offense. Thus, we find the trial court did not error in granting Klemme four jury strikes.

IV. CRUEL AND UNUSUAL PUNISHMENT. Klemme's final claim is that his sentence constitutes cruel and unusual punishment as applied to him.[4] This is a constitutional question, so we review de novo. *Bruegger*, 773 N.W.2d at 869. Klemme seeks for this court to apply the criteria outlined in *Bruegger*, 773 N.W.2d at 884–85, and find his sentence must be reversed and his case remanded for "a sentencing procedure that will comport with the Iowa constitution." We find Klemme misapplies *Bruegger* to this case.

Bruegger held, "at least in some instances, defendants who commit acts of lesser culpability within the scope of broad criminal statutes carrying stiff penalties should be able to launch an as-applied cruel and unusual punishment challenge." *Bruegger*, 773 N.W.2d at 884. Prior to *Bruegger*, Iowa cases addressing cruel and unusual punishment challenges seemed to reject individualized determinations. *Id.* *Bruegger* broke from these previous cases by establishing, a defendant should be allowed to make an "as applied" challenge. *Id.* However, the court considered these claims to be available in only rare cases, so they gave guidance to the lower courts to help determine when to permit defendants to make "as applied" challenges. *Id.*

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[4] Klemme does not assert Iowa Code section 901A.2(2) violates the cruel and unusual punishment clause of the state or federal constitution on its face, and therefore, we do not address that issue.

The *Bruegger* court analyzed three criteria and concluded the case involved "an unusual combination of features that converged to generate a high risk of potential gross disproportionality." *Id.* The criteria included, "a broadly defined crime, the permissible use of preteen juvenile adjudications as prior convictions to enhance the crime, and the dramatic sentence enhancement for repeat offenders." *Id*. The court did not say these three factors converged to *create* gross disproportionality as Klemme argues. Rather the *Bruegger* court found the convergence of these factors established Bruegger's case was one of the rare cases where a defendant should be permitted to make an "as applied" challenge. *Id*. The case was to be remanded to district court for an evidentiary hearing to answer the ultimate question of whether Bruegger's sentence was grossly disproportionate amounting to cruel and unusual punishment as applied to him. *Id*. at 886.

The three factors the Bruegger court used did not establish Bruegger's sentence was cruel and unusual as Klemme argues. *Id*. at 885 ("Our narrow conclusion that Bruegger, in light of the unusual convergence of [the three factors], may bring a cruel and unusual punishment challenge to Iowa Code section 901A.2(3) as applied to him, does not resolve the case."). The three factors were used to determine whether Bruegger got to make the claim at all. *Id*. The supreme court indicated on remanded the factors in *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3011, 77 L. Ed. 2d 637, 650 (1983),[5] needed to

[5] The three criteria to be analyzed under *Solem* include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same

be analyzed to determine whether the punishment was cruel and unusual as applied to Bruegger. *Id.* at 886.

The district court in this case did not engage in the *Bruegger* analysis to determine whether Klemme should be permitted to make the "as applied" challenge. Instead, the court simply allowed Klemme to make his challenge and then ruled, "looking at the Defendant's overall criminal history of behavior, I don't believe that the sentences are grossly disproportionate to the punishment." The district court here reached the ultimate issue which was left open in *Bruegger* — whether the punishment was grossly disproportionate as applied to the defendant. *Id.* The *Bruegger* court could not reach the ultimate issue based on the record on appeal because Bruegger had not raised the cruel and unusual punishment claim before the trial court. *Id.* at 885.

In our de novo review, we find Klemme's case is not one of the "relatively rare case[s] where an individualized assessment of the punishment imposed should be permitted." *Id.* at 884. As stated above, Bruegger was permitted to make such a challenge because his case involved the convergence of three factors that created a "substantial risk that the sentence could be grossly disproportionate as applied." *Id.* Of the three factors in *Bruegger*, Klemme's case only has one: "the dramatic sentence enhancement for repeat offenders." *Id.* Klemme was sentenced to a period of incarceration not to exceed ten years and he has to serve at least eighty-five percent of that sentence before being eligible for parole because he is a repeat offender. Iowa Code § 901A.2(2). We

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jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292, 103 S. Ct. at 3011, 77 L. Ed. 2d at 650.

recognize this sentence increases substantially the normal sentence for serious misdemeanor of indecent exposure, which is a period of incarceration not to exceed one year. *See* Iowa Code § 903.1(1)(b). However, this single factor alone is not sufficient to satisfy *Bruegger*. The other two factors are not implicated in this case. Klemme's prior offenses were not committed when he was a preteen and the crime of indecent exposure does not cover a wide variety of circumstances. *Id.* at 884–85.

Because Klemme's case is not one of the rare cases where there is "an unusual combination of features that converged to generate a high risk of potential gross disproportionality," we find he is not entitled to make an "as applied" cruel-and-unusual-punishment challenge.

V. CONCLUSION. We find there was sufficient evidence to support Klemme's conviction for indecent exposure. The sentence enhancements applicable to Klemme's case did not change the classification of the underlying offense so as to deprive the district associate judge of subject matter jurisdiction or require Klemme to be given six peremptory jury strikes. Finally, Klemme's case does not satisfy the *Bruegger* criteria, which would permit him to make an "as applied" cruel and unusual punishment challenge.

AFFIRMED.