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Summary of State v. Catanio, 120 Nev. Adv. Rep. 103

Christopher Carson
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State v. Catanio, 120 Nev. Adv. Rep. 103 (2004)¹

**CRIMINAL LAW- STATUTORY INTERPRETATION:
“TOUCHING” REQUIREMENT OF NRS 201.230**

Summary

This case was an appeal by the State from a district court order dismissing charges of lewdness with a minor for failure to meet an essential element of the test laid out in NRS 201.230.

Catanio worked as a teacher’s aide and volunteer track coach at a middle school in Reno, Nevada. During the fall of 2002, Catanio befriended three young boys and began giving them gifts on a daily basis. The gifts escalated from candy to more elaborate, personal and inappropriate objects including video game systems, air pistols, pornographic material and condoms.

In December 2002, Catanio escalated the relationship with the boys during a snowball fight. Catanio invited the boys to go behind some bushes and masturbate. Catanio promised the boys cash if they did so. Two of the three boys accepted Catanio’s offer and masturbated behind some bushes while Catanio watched from his car. A few days later, Catanio bought a cell phone for one of the boys; they used the phone for sexually oriented conversations. In two separate instances, two of the boys snuck out of the house to meet Catanio. Each time, Catanio provided the boys with alcohol, pornographic material and a condom and invited them to masturbate.

Catanio admitted to the authorities that he was aroused at each of these instances, but at no time did Catanio have any physical contact with the boys. He only masturbated after taking the boys home. The district court, after reviewing the grand jury testimony, dismissed the lewdness charge against Catanio. The district court concluded that NRS 201.230 required actual physical contact between the accused and the victim.

On appeal the State argued that physical touching was not an essential element of NRS 201.230. To support this, the State pointed to California’s lewdness statute², which is very similar to Nevada’s, has been interpreted to require that the accused act to instigate or encourage the touching. The touching necessary under California’s statute may be the child’s upon himself if done at the perpetrators urging.

The court ultimately held that NRS 201.230 did not require a physical touching by the accused, but based its rationale on several fronts. First, as a matter of statutory interpretation the court found that the language of NRS 201.230 supported the outcome. NRS 201.230 states in relevant part:

A person who willfully and lewdly commits any lewd or lascivious act, other than the crime of sexual assault, upon or with the body,

¹ By Christopher Carson

² See Cal. Penal Code § 288(a) (West 1999)

Any person who willfully and lewdly commits any lewd or lascivious act...upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, gratifying the lust, passions, sexual desires of that person or the child, is guilty of a felony

or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, gratifying the lust, passions, sexual desires of that person or the child, is guilty of a lewdness with a child.³

The court focused on the use of the disjunctive **or** in the phrase “upon or with” as a showing that upon and with have different meanings in the context of the statute. The court held that “an act committed “with” the minor’s body indicates that the minor’s body is the object of attention, and that language does not require a physical touching.”⁴ Subsequently, the court found that Catanio satisfied the touching element of NRS 201.230 when he induced the boys to masturbate by using gifts even though he never actually physically touched them.

Issue and Disposition

Issue

Pursuant to NRS 201.230, is actual physical touching an essential element of lewdness with a minor?

Disposition

Yes, a valid interpretation of the statute and case law from adjacent jurisdictions support that to satisfy the elements set forth in NRS 201.230, the perpetrator need only cause a child to perform a lewd act upon him or herself the perpetrator need not actually touch the child.

Commentary

State of the Law Before *Catanio*

Additional reasoning for the Court’s holding here was that prior to this case all but one of the cases dealing with NRS 201.230 involved an actual physical touching of the minor.⁵ Since the law in this area was lacking the Court looked to California’s interpretation of their substantially similar statute. In California, the touching a child while guiding her into an orchard at knifepoint where she was offered a dollar to pull down her pants was enough to satisfy the touching element.⁶ The touching requirement was further clarified in California in *People v. Mecham*, where the California Second

³ NEVADA REVISED STATUTES 201.230 (2003).

⁴ State v. Catanio, 120 Nev. Adv. Rep. 103 at 5 (2004).

⁵ See e.g. Crowley v. State, 120 Nev. 30, 31-32, 83 P.3d 282, 284 (2004) (defendant rubbed male victim’s penis outside of clothing and performed fellatio on victim); Scott E., a Minor v. State, 113 Nev. 234, 236, 931 P.2d 1370, 1371 (1997) (defendant allegedly touched victim’s vaginal area and had victim touch his penis); *contra* Houtz v. State, 111 Nev. 457, 893 P.2d 355 (1995) (appealed on different grounds where defendant provided alcohol and pornographic materials to victim and ordered victim to masturbate but never touched him touching issued not challenged).

⁶ People v. Austin, 168 Cal. Rptr. 401, 402 (Ct. App. 1980).

District Court of Appeal held that instructing children to touch themselves satisfied the elements of lewdness with a minor as long as the perpetrator had the requisite intent.⁷

Effect of *Catania* on Current Law

The effect of *Catania* is narrow but important. By establishing that both the perpetrator and the victim may satisfy the physical touching element, the court closed a possible loophole that could have allowed alleged child predators to escape punishment on a technicality.

This decision may also have import to case beyond lewdness as well. Similar statutes like rape and sexual assault require a touching element; this decision could be applied to those statutes by analogy to protect people of all ages from forced sexual depravities.

Conclusion

At first glance the decision in *Catania* seems like common sense; any perpetrator who forces a child into a lewd act upon his or herself should not be able to escape punishment simply because he/she did not physically touch the child. But by supporting its outcome by using statutory interpretation as well as comparatively equal jurisdictional case law, the court ensures that this decision is unlikely to be overturned upon appeal and ensures justice is not fleeting for the most vulnerable portion of our population.

⁷ 199 Cal. Rptr. 586, 593 (Ct. App. 1984), *abrogated on other grounds by* People v. Brown, 883 P.2d 949, 959 (Cal. 1994).