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Moore v. State, 136 Nev. Adv. Op. 71 (Oct. 29, 2020)

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DEFENSES TO LEWD ACTS WITH MINORS: MISTAKE OF FACT DEFENSE

Summary

The Court determined that as to the crime of lewdness with a minor under 16 years old (under NRS 201.230), the defense as to mistake-of-fact for the age of the minor is not recognized. Although lewdness with a minor is a specific-intent crime, the element as to the age of the minor is not specific-intent.

Background

Maurice Moore is a 41-year-old male that posed as a 23-year-old male on the dating app called Tinder. The minor posed as an 18-year-old female on the same app, although she was really a 14-year-old. Moore and the minor decided to meet up to have sex. The minor snuck out of her residence and met up with Moore in his vehicle where the two proceeded to engage in oral, vaginal, and anal sex. Moore also groped the minor's breasts and slapped her buttocks. During this period, the minor's mother contacted police when she did not locate the minor at home. Once the minor came home, the mother used the minor's phone to bring Moore back. Before Moore's arrest, the minor claimed to police that the sex in Moore's vehicle was not consensual. When Moore came back to the residence, police arrested him. Moore claimed the sex was consensual and that he believed the minor was 18.

The State charged Moore with five counts of sexual assault with a minor under 16 years old and two counts of lewdness with a child under 16. All counts went to a jury trial. During jury instructions, Moore wanted to instruction to include a mistake-of-fact defense as to the minor's age. The judge declined to instruct the jury in a way that recognized this mistake-of-fact defense or to allow an indication that the State needed to prove that Moore knew the minor's age. Moore also wanted a jury instruction that defined "willfully" as requiring the specific intent to engage in a lewd act with a person under 16. The jury instructions read that for a lewdness conviction, the State had to prove intent only applied to commit the lewd act and to arouse himself or the minor during the commission of the lewd act. The jury convicted Moore on the lewd counts only. Moore then appealed.

On appeal, Moore has two contentions about the jury instructions given in his trial. The first contention is that the court should have allowed an instruction the jury about the mistake-of-fact defense regarding the minor's age. The second contention is that the court should have instructed the jury that "willfully" requires specific intent to commit the lewd act with a minor under 16.

The State contends that the jury instructions were not erroneous. The state further asserts that "willfully," as written in NRS 201.230(1)(a), only requires a showing of specific intent about intending to arouse and intending to commit a lewd act.

¹ By Rachael T. Gonzales

Discussion

Does Nevada recognize a mistake-of-fact defense to the element of the minor's age?

Nevada recognizes that lewdness with a child under 16 is a specific intent crime.² Normally, a specific intent crime allows a mistake of fact defense.³ The Court looked to the actual statute to help clarify the differences in the arguments made on appeal.

The lewdness with a child under 16 statute reads as follows:

A person is guilty of lewdness with a child if he . . . willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child. . . .⁴

When the Court analyzed this portion of the statute, the Court determined that the use of the word “intent” preceding the language about arousing and the absence of the word “intent” before “under the age of 16” indicated that the specific intent to the age was not a legislative intent. The Court also determined that there was no language to indicate the defendant required knowledge of the minor's age in the statute. This absence indicated that the element of the minor's age did not require defendant's knowledge of the minor's age.

Therefore, Nevada does not recognize a mistake-of-fact defense to the element of the minor's age.

Does “willfully” in NRS 201.230(1)(a) require a showing of specific intent as to the minor's age?

The Court also considered public policy behind statutes aimed to protect children from abuse and determined that “willfully” referred to a general intent to do the act.⁵ The Court applied this to NRS 201.230(1)(a) and determined that “willfully” in the statute only required that the lewd act was committed deliberately. Additionally, the Court believed that allowing a mistake-of-fact defense would be contrary to the public policy of protecting children.

To Moore's contention about the lower court's reliance on California law, the Court held that the court was allowed to consider California statute about lewdness with a minor because California and Nevada's versions of these laws were substantially similar. The Court found that the public policies in both states were similar.⁶ The Court also held that Nevada courts had previously cited California law as persuasive authority in lewdness with a minor and therefore, the

² See *State v. Catanio*, 120 Nev. 1030, 1036, 102 P.3d 588, 592 (2004).

³ NEV. REV. STAT. 194.010(5) (2019).

⁴ NEV. REV. STAT. 201.230(1)(a) (2019).

⁵ *Jenkins v. State*, 110 Nev. 865, 870, 877 P.2d 1063, 1066 (1994).

⁶ *People v. Olsen*, 685 P.2d 52, 57 (Cal. 1984).

court's reliance was appropriate.⁷

Accordingly, NRS 201.230(1)(a) use of "willfully" did not require a showing of specific intent as to the minor's age. The Court affirmed the conviction because Moore never refuted that sex or the lewd acts of groping the minor's breasts and slapping her buttocks occurred. Further, from the messages exchanged between Moore and the minor, Moore intended to commit these lewd acts and intended to arouse.

Conclusion

The Court concluded that mistake-of-fact about the minor's age is not a defense available to a count of a lewd act with a minor under 16. The Court reasoned that the statutory language was clear and unambiguous, and that public policy favored this interpretation. The Court concluded that a lewd act with a minor under 16 is a specific intent crime and the State must only prove a specific intent to arouse and to commit a lewd act.

⁷ *Catania*, 120 Nev. at 1036, 102 P.3d at 592.