

FILED
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
STATE OF OKLAHOMA

JUN - 9 2005

JOHN CHRIS CORNELIUS,)	MICHAEL S. RICHIE
)	CLERK
Appellant,)	
)	
v.)	No. M 2004-0255
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY ORDER

Appellant was found guilty March 11, 2004, in the District Court of Oklahoma County, Case No. CM-2003-3304, of Outraging Public Decency and was sentenced to six months in the County Jail and fined \$500.00. Appellant appeals from the Judgment and Sentence imposed.

On appeal Appellant raised the following propositions of error:

1. The State's failure to prove all material elements and every fact necessary to the alleged offense; as well as the trial court's erroneous instructions which diluted, if not eliminated the State's burden, require reversal.
2. There was no crime committed in violation of 21 O.S. 22 and the case should be reversed and dismissed.
3. The trial court relied upon non-presented evidence and declined to entertain suspension or deferment of sentence in issuing its excessive sentence, which the court should modify and order it be suspended or deferred.

Security personnel at Walmart detained Appellant after observing his behavior which they deemed suspicious. Appellant was wandering through several departments in the store talking on a mobile phone with a PDA (personal

digital assistant) in the other hand. The security personnel believed Appellant was taking pictures by placing the PDA, which contained a camera, between the legs of women wearing skirts, unbeknownst to the women. Photographs were not found. The PDA did not reflect photographs had been taken.

In the first proposition of error Appellant argues that although the original information alleged the specific act "by photographing women underneath their dresses with a camera in a public place, Walmart", the jury instructions amounted to deletion of that specific act from the jury's consideration and "constituted a material amendment of the information". Appellant argues that nowhere in the instructions did the trial court attempt to define or explain the charged offense. Appellant argues this "amendment" was not only material and prejudicial, but also operated to deny Appellant any semblance of notice or Due Process.

The Information, as amended, charged Appellant with:

On or about the 29th day of July 2003, A.D., the crime of outraging public decency was unlawfully committed in Oklahoma County, Oklahoma by John Cornelius acting, who did willfully and wrongfully commit an act injurious to public morals which openly outraged public decency by [sic] then and there by photographing women underneath their dresses with a camera in a public place, Walmart, contrary to the provisions of section 22 of Title 21 of the Oklahoma Statutes, and against the peace and dignity of the State of Oklahoma.

A uniform jury instruction for Outraging Public Decency has not been established. Appellant's proposed instruction setting out the elements of this

crime¹ was rejected. The State's proposed instruction, citing Roberts v. State, 27 Okl. Cr. 97, 225 P. 553 (1924), and Hulsey v. State, 86 Okl. Cr. 273, 192 P.2d 301 (1948), was adopted by the trial judge in this case:

No person may be convicted of Outraging Public Decency unless the State proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully
Second, wrongfully
Third, openly
Fourth, committed any act which is so grossly immoral as to shock the decency of self-respecting people as a whole, or any act manifestly indecent and repugnant to the usages and customs of civilized society, or any act which is questionably [sic] criminal, though not covered by any other criminal statute. (emphasis added)

However, the language from Roberts, which provides a general definition of "outraging public decency" without being tailored to the conduct charged, fails to necessarily restrict the jury's consideration to conduct deemed criminal, rather than conduct which is merely reprehensible. Rather than using the language from Roberts as an element of the crime, it should have been provided to the jury as a definition of "outraging public decency", with the element being "outraging public decency by _____ (description of acts meeting definition)." The jury instruction proffered by Appellant in this case, and rejected by the trial court, is more appropriate.

¹ No person may be convicted of outraging public decency unless the State proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully and wrongfully
Second, openly
Third, outrages public decency and is injurious to public morales [sic]
Fourth, by photographing women underneath their dresses.

Additionally, in parroting Roberts, there was a material flaw when the trial court instructed as to an act which is "questionably criminal" rather than "unquestionably criminal". See *Roberts v. State*, 27 Okl. Cr. 97, 103, 225 P. 553 (1924). This is a material instructional error which definitely would impact guidance of the law given to the triers of fact. Normally, instructional errors of this type require reversal and remand for a new trial. However, upon further review we find more fatal error in the State's desire to prosecute under this general statute.

In *Rachel v. State*, 71 Okl.Cr. 33, 40, 107 P.2d 813 (1940), this Court discussed the nature of the requirement that any prosecution for openly outraging public decency and injuring public morals, be for acts which are committed "openly" and affect the public. The term "openly" is defined to mean "in an open manner, not clandestinely, not privately or in private, and is used in the sense of not being concealed as opposed to being hidden or secret." See *Hixon v. State*, 96 Okl. Cr. 311, 313, 254 P.2d 387 (1963).

The uncontradicted testimony in this case is that the alleged acts were at the very least alleged to be clandestine. The alleged victims were not even aware of the alleged acts being committed against them. In fact, it was the perception that Appellant was attempting to be secret that brought his conduct to the store's attention.

The State has discretion in electing the criminal charges to bring against a defendant in the State of Oklahoma. When there are statutory options, the State

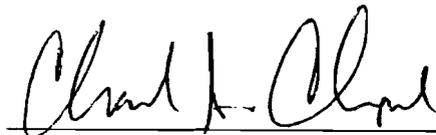
can elect between those options. But, when the choice is made, the State must prove each element beyond a reasonable doubt.

In the present case the State elected to prosecute under Section 22 of Title 21, a more general statute, when more specific statutes relating directly to acts which form the facts of this case, could have been used.² Since the State elected to proceed under this statute and the facts of this case do not support the elements of the charged offense - specifically "openly", the error is one that goes to sufficiency of the evidence as a matter of law. As jeopardy has attached in this case, the only remedy is reversal with instructions to dismiss.

IT IS THEREFORE THE ORDER OF THIS COURT, the case is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, Rules of *the* Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

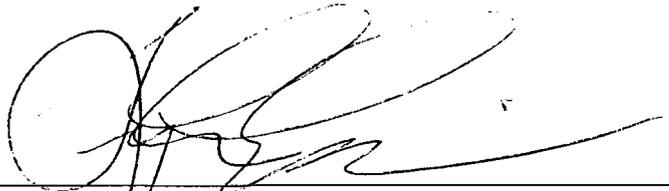
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th
day of June, 2005.

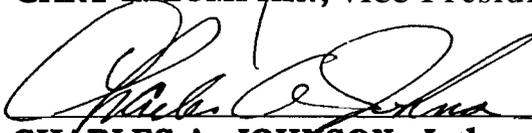


CHARLES S. CHAPEL, Presiding Judge

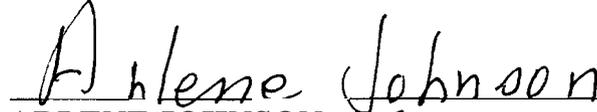
² See 21 O.S. 2001, § 1171(B) ("Every person who uses photographic, electronic or video equipment in a clandestine manner for any illegal, illegitimate, prurient, lewd or lascivious purpose with the unlawful and willful intent to view, watch, gaze or look upon any person without the knowledge and consent of such person when the person viewed is in a place where there is a right to a reasonable expectation of privacy, or ...".)



GARY L. LUMPKIN, vice Presiding Judge



CHARLES A. JOHNSON, Judge



ARLENE JOHNSON, Judge

ATTEST:



Clerk