Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-512

DECEMBER TERM, 2002

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont, Unit No. 2, Bennington Circuit
John J. Gall	}	DOCKET NO 1159-8-00 Bncr
	}	Trial Judge: David Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction on two counts of lewd and lascivious conduct, arguing that the trial court erred (1) by not instructing the jury that the charged offense requires a finding of specific intent, and (2) by not instructing the jury to consider his defense of diminished capacity due to voluntary intoxication. We affirm.

Defendant was charged with three counts of lewd and lascivious conduct, in violation of 13 V.S.A. § 2601, based on allegations that on the morning of August 30, 2000, he grabbed a woman' s buttocks, exposed himself to the same woman, and fondled another' s woman' s breast. After the State rested its case at the September 26, 2001 trial, the district court granted defendant' s motion for judgment of acquittal with respect to the count alleging that he grabbed one of the women' s buttocks, but denied the motion with respect to the other two counts. The jury found defendant guilty on both counts, and the court sentenced him to a thirty-to-sixty-month term of imprisonment.

On appeal, defendant argues that the trial court erred by denying his request to instruct the jury that lewd and lascivious conduct is a specific intent crime. He further argues that because lewd and lascivious conduct is a specific intent crime, and there was substantial evidence of his intoxication at the time of the offense, the trial court erred by not instructing the jury to consider his defense of diminished capacity due to involuntary intoxication. We reject both claims of error.

Notwithstanding defendant' s arguments to the contrary, this Court has already determined that specific intent is not an element of § 2601. See State v. Grenier, 158 Vt. 153, 156 (1992); State v. Maunsell, 170 Vt. 543, 544 (1999) (mem.). Under § 2601, a person convicted of " open and gross lewdness and lascivious behavior shall be imprisoned not more than five years or fined not more than $300.00, or both." In contrast, under 13 V.S.A. § 2602, " [a] person who shall wilfully and lewdly commit any lewd or lascivious act upon . . . a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of such person or of such child, shall be imprisoned for the first offense, not less than one year nor more than five years, or fined not more than $3,000.00, or both . . . ." (Emphasis added). In Grenier, 158 Vt. at 156, we rejected the defendant' s argument that the trial court committed plain error by refusing to give the jury a specific intent instruction with respect to § 2601, the charged crime. We noted that although this Court had previously suggested in State v. Millard, 18 Vt. 574, 577 (1846) and State v. Purvis, 146 Vt. 441, 443 (1985) that lewd and lascivious conduct involves actions calculated to excite unchaste passions and outrage the feelings of others, those cases did not address the issue of whether lewd and lascivious conduct is a specific intent crime, and the language referred to by those cases appears in § 2602 but not § 2601. Grenier, 158 Vt. at 156. We concluded that " [i]f the Legislature had intended to include specific intent, in addition to general intent, as an element of lewd and lascivious conduct, it presumably would have done so." Id.

In an attempt to distinguish Grenier, defendant points out that its holding was based on a plain-error analysis. But, as we stated in Maunsell, 170 Vt. at 544, " the reasoning we adopted in Grenier is dispositive" on the issue of whether specific intent is an element of § 2601. We do not agree with defendant that interpreting § 2601 as a general intent statute creates absurd results by rendering that statute indistinguishable from 13 V.S.A. § 2632(a)(8), (b), which provides that a person engaging in prostitution, lewdness or assignation may be fined no more than $100 or imprisoned for no more than one year. Unlike § 2632(a)(8), § 2601 requires proof of open and gross lewdness and lascivious behavior.

As for defendant' s second argument, even if we were to determine that diminished capacity based on alcohol impairment could be a defense to a § 2601 prosecution, we would not find reversible error here. Defendant' s conduct toward the two victims " exposing his erect penis to one and grabbing the other' s breast " was manifestly sexual in nature, cf. State v. Gabert, 152 Vt. 83, 85 (1989) (act of grabbing woman' s breast and attempting to lay on top of her demonstrated unequivocal sexual motivation), and the evidence of defendant' s impairment " smelling of alcohol and stumbling around " was insufficient for the jury to conclude that defendant' s mental capacity was so diminished that it prevented him from understanding the

nature of his acts. See State v. Kinney, 171 Vt. 239, 243-44 (2000) (trial court need not instruct jury on diminished capacity defense unless evidence was sufficient for jury to conclude that defendant' s level of intoxication was so great that he could not have formed requisite intent required by charge).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice