Did the Trial Court err when it failed to establish a burden of proof and failed to place that burden on Appellee?

DISCUSSION

The Trial Court's order of September 2, 2005 is treated by this Court as a summary judgment motion, as that is what it most closely resembles. Therefore our standard of review is *de novo*, and we review the evidence and law as if we were the Trial Court making its own independent judgment. *Stone v. Colville Business Council*, AP98-009, 5 CCAR 16 (1999).

The burden of proof on a motion such as Appellee's is on the person making the motion, in this case the Appellee[10]. The burden of proof will be with the party asserting the truth of a proposition. "The general and elementary rule is that, as between two such parties, the burden of proof rests upon him who asserts the existence of facts, and not upon him who denies their existence. The former and not the latter, must finally satisfy the trier of truth of the facts asserted." *Fishel v. Motta,* 76 Conn. 197, 56 A. 558 (1903). The Trial Court did not establish a burden of proof which the Court must do. Appellee as the moving party had the burden of proof, and the Trial Court failed to place that burden on Appellee.

We REVERSE the Trial Court's order of September 2, 2005, and remand for a new hearing on the motion of Appellee to require Appellant to reimburse per capita payments. It is SO ORDERED.

Randy ZACHERLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-006, 5 CTCR 04

9 CCAR 10

[Steve Graham, Law Office of Steve Graham, for Appellant.

Jonnie Bray, Office of Prosecuting Attorney, for Appellee.

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[10] The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances. *Follman v. Upper Valley Special Education Unit*, 200 ND 72, citing to *First National Bank of Crosby v. Bjorgen*, 389 N.W.2d 789, 794, 796 (N.D. 1986).

Trial Court Case No. CR-2006-29043]

Argued November 17, 2006. Decided April 11, 2007.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Gary L. Bass, Presiding.

Dupris, CJ

SUMMARY

On February 23, 2006 Appellant was charged by an Amended Criminal Complaint for, *inter alia*, one count of Indecent Liberties, in violation of CCT §3-1-9.[11] The criminal actions alleged to have violated this statute occurred in July, 2004. On May 12, 2006 a jury found Appellant guilty of the charge of Indecent Liberties. It is this verdict which is the subject of this appeal.

Appellant makes two assignments of error: first, the trial judge erroneously overruled a ruling of a another judge, and thereby admitted evidence he should not have admitted. Second, the Tribes failed to prove an element of the offense, thereby mandating a dismissal of the charge. For reasons stated below we find neither ground for Appeal was supported by the law and evidence, and deny Appellant's request for a reversal.

FACTS

The jury found the Tribes proved Appellant committed the charge of Indecent Liberties beyond a reasonable doubt. The charging complaint stated that on July 24, 2004, on the Colville Reservation, Appellant did record images of a minor child, under the age of sixteen (16), while she slept, focusing on her groin area, and touching her in the vaginal area and buttocks. Further, he masturbated while touching the minor girl's groin area. The Court charged the jury with instructions regarding the elements of the offense of Indecent Liberties found in the statutes before they were amended in November, 2004. That is:

> 3-1-9. **Indecent Liberties**
>
> Any person who knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion, or when the other person is less than 16 years of age, or when the other person is mentally or physically incapable of consent, shall be guilty of Indecent Liberties. (*See* Jury Instruction 2).

[11]. Appellant was also charged with Public Nuisance, in violation of CCT §3-1-194. This charge was subsequently dismissed before it went to Trial. It is not part of this Appeal.

In November, 2004, the statute was amended, making it a crime when, *inter alia*:

> "(a) A person is guilty of Indecent Liberties when such person causes another person under the age of sixteen who is not his or her spouse to have sexual contact with him, her or another." (*Id*; emphasis added).

Part of the testimonial evidence came from Tammy Zacherle, who stated that in July, 2004 she was married to Appellant. There was no direct evidence the minor victim herein was not married to Appellant.

ISSUES

1. Did the Trial Judge abuse his discretion by modifying the order of a prior judge without holding a hearing?
2. Is the verdict inconsistent with the evidence?[12]

STANDARD OF REVIEW

We review findings of fact under the clearly erroneous standard, and errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). The issues raised herein are issues of law.

DISCUSSION

ISSUE 1: MODIFICATION OF COURT ORDER

Appellant, in his brief states: "The record of the court hearings and the written orders reflects [*sic*] a broader intent to exclude evidence then [sic] Judge Aycock recognized." (Appellant's Opening Brief at p2). He cites some State cases to support his argument that Judge Aycock allowed evidence that was excluded under an order entered by Judge Johnston. We have a case on point for the proposition that one judge cannot interfere with an order of another judge. *See*, *Sonnenberg v.*

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[12]. At the Initial Hearing Appellant also raised the issue "Did the Trial Judge abuse his discretion by alleged *ex parte* communication with the Spokesperson of one of the parties?" In his Opening Brief he waives this argument.

Fry, 4 CCAR 3, 2 CTCR 36, 24 ILR 6172 (1997) . We do not need to consider the cited State cases.

From a review of the record it appears Judge Johnston's Order Regarding Suppression of Evidence, dated "Done in Court April 11, 2006 and signed this 11th day of May, 2006" [tab #6] is the order referred to by Appellant. There is no "Filed" stamp date on the order.[13] Judge Johnston states, in the relevant part: "The Court accepts the stipulation of the parties and suppresses still photos from the video and directs the Tribes to no longer attempt to obtain material from the video, no still photos from the video will be at trial in this matter."

It is not clear from the briefs or from the oral arguments of the parties what specific evidence should have been suppressed and was admitted. Appellant did not clarify this at the Oral Arguments, either. He did not indicate what evidence it was that should have been suppressed. He cited no legal authorities. Without sufficient argument on this issue it is denied.

ISSUE 2: FAILURE TO PROVE AN ELEMENT OF THE OFFENSE

This issue raises a preliminary issue: was Appellant charged with the correct statute? If he should have been charged with the amended statute, then we must address whether failure to specifically include the element that the minor victim was not his spouse defeats the conviction.

A. The Amended Statute of November, 2004 Applies

It is clear from the charging complaint and evidence that the acts constituting the crimes charged occurred July, 2004, four (4) months before the Indecent Liberties statute was amended in November, 2004. Neither party provided us with any arguments or authorities on this issue. It appears from the record Appellant did not object to the jury instruction which used the pre-November, 2004 statute. We have no cases on point regarding this issue. Our research finds no case on point in the federal cases, either. It is not an *ex post facto* issue because the law passed after the commission of the crime herein, *i.e.* "Indecent Liberties," was more specific than the one under which Appellant was charged.[14]

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[13]. At Oral Arguments neither party seemed to be aware there was a written order; this may explain why there was no "Filed" stamp on it. It was found in the Trial Court's official file, but may have been filed without being processed.

[14]. The *ex post facto* doctrine has its roots in English common law. It's widely accepted Anglo-court rules dictate four areas where a law has *ex post facto* applicability: "[1] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [2] Every law that aggravates a crime, or makes it greater than it was, when committed. [3]. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [4] Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the

The purpose of a statute is to provide a defendant with " adequate notice of prohibited conduct under Tribal law." *Wiley et al. v. CCT*, 2 CCAR 60, 72, 2 CTCR 9, 22 ILR 6059 (1995). Jurisdiction attaches at the time the complaint is filed. *Simmons v. CCT*, 6 CCAR 30, 36, 3 CTCR 45, 29 ILR 6065 (2002). A complaint has to give sufficient notice of the specific acts that formed the basis of the crime charged. *Louie v. CCT,* 2 CCAR 47, 48, 2 CTCR 5, 21 ILR 6136 (1994). It is a natural progression, based on these tenets of law, that Appellant should have been tried under the more specific, later statute for "Indecent Liberties." It was the law in existence at the time the complaint was filed and the one which would have given Appellant constructive notice that his actions were a violation of tribal law. We so hold.

B. Failure to Use the Language of the Amended Statute Does Not Defeat the Conviction

Elements of an offense are those facts offered to prove a defendant committed specific acts at a specific place, time and date which constitute criminal behavior. *Seymour v. CCT*, 6 CCAR 5, at 8-9, 3 CTCR 40, 29 ILR 6009 (2001) , *See*, generally, *Pakootas v. CCT*, 1 CCAR 65, 1 CTCR 67 (1993); *Condon v. CCT*, 3 CCAR 48, 2 CTCR 20, 23 ILR 6327 (1994); *CCT v. Clark*, 4 CCAR 53, 2 CTCR 45, 25 ILR 6066 (1998); and *Amundson v. CCT*, 4 CCAR 62, 2 CTCR 68, 25 ILR 6178 (1998). Further, a defendant is denied due process when he is found guilty of all charges upon insufficient evidence that all elements of all the offenses had been proved beyond a reasonable doubt. *Thomas v. CCT*, 1 CCAR 35, 37, 1 CTCR 48, 18 ILR 1626 (1990) However, neither of these rules of law preclude us from upholding the jury's finding of guilt in this matter, even when the jury instruction did not include the language that the victim was not Appellant's spouse.

We are asked to overturn a jury verdict. As we stated in *Tonasket v. CCT*, 7 CCAR 40, 4 CTCR 13 (2004), "[j]ury trials are not tribally culturally-based; we have adopted them from the non-Indian judicial systems. As such we need to look to their origins in the non-Indian culture for guidance." Impeaching jury verdicts is frowned upon as a matter of public policy. In other criminal matters we are instructed to look to the federal system for guidance, in the absence of tribal law. For these reasons we will look to the federal law for guidance on this issue, which is one of first impression for this Court.

The U.S. Supreme Court acknowledges a distinction between trial errors that are of constitutional magnitude that render a trial fundamentally unfair and those errors that are harmless.

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offender." *Calder v. Bull*, 3 Dall. 386, 390 (1798) (Chase, J.). The Tribes recognizes this anglo-based law in its Civil Rights Act. *See* §1-5-2(ii).

See, Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).[15] The *Neder* Court found "[a]n instruction that omits an element of the offense differs markedly from the constitutional violations this Court has found to defy harmless-error review, for it does not necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Omitting an element can easily be analogized to improperly instructing the jury on the element, an error that is subject to harmless-error analysis...." (cite omitted).

We hereby adopt the *Neder* standard of harmless-error when reviewing cases in which an element of an offense is omitted as in this case. In doing so, we note the record supports evidence was given to the jury showing Appellant was married to Tammy Zacherle at the time of the crime. This was not disputed by Appellant at the trial. The jury had sufficient evidence before it to infer Appellant was not married to the minor victim at the time of the crime. His trial was not fundamentally unfair nor unreliable. The error was harmless. We so hold.

Based on the foregoing we AFFIRM the jury verdict of guilty, and REMAND this matter to the Trial Court for disposition consistent with this Order.

It is SO ORDERED.

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[15]. "A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. For all other constitutional errors, reviewing courts must apply harmless-error analysis...." (cite omitted)