MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

John Wayne Swayzer, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 20, 2024
Court of Appeals Case No.
23A-CR-1867
Appeal from the Boone Circuit Court
The Honorable Lori N. Schein, Judge
Trial Court Cause No.
06C01-2206-CM-1015

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] John Wayne Swayzer, Jr., appeals his conviction for public indecency as a class A misdemeanor and claims the evidence is insufficient to sustain the conviction. We affirm.

Facts and Procedural History

[2] At approximately 12:00 p.m. on May 14, 2022, Melissa Pursley parked her vehicle in the parking lot of a shopping center in Boone County and entered a hardware store. Pursley returned to her vehicle, pulled out of her parking space, received a text message from her mother, and pulled into another parking space to respond to the message. The driver's window of Pursley's vehicle was down. About one or two minutes later, a red car driven by Swayzer "pulled in two spots to [her] left and then backed out and pulled in right next to [her]." Transcript Volume II at 7. Pursley thought it was "weird that he backed out and pulled in right next to [her]." *Id*. Swayzer and Pursley's vehicles were facing the same direction, and the front passenger window of Swayzer's vehicle was next to the front driver's window of Pursley's vehicle. Pursley noticed the front passenger window of Swayzer's vehicle roll down, which caused her to look, and she saw Swayzer "with his phone in his left hand and his penis in his right hand masturbating." *Id*. Swayzer "was laying back" and his phone "was vertical and it was facing [Pursley], the camera side of the phone, so the back of the phone was facing [her]." *Id*. at 8. Pursley drove out of the parking space, stopped in another area of the parking lot, and called 911. Pursley explained to the dispatcher what happened, the dispatcher asked if she

could obtain Swayzer's license plate information, and Pursley drove behind Swayzer's car, obtained his license plate information, gave the information to the dispatcher, and then exited the parking lot. Zionsville Police Officer Nicholas Ruby responded to the scene, located Swayzer, and spoke with him. Swayzer denied that the incident occurred.

[3] The State charged Swayzer with public indecency as a class A misdemeanor, and the court held a bench trial at which Pursley testified to the above. When asked "[a]re you sure it was his penis that he had in his right hand and not something else," she answered "I'm absolutely sure," and when asked if Swayzer had "a gun or anything like that," she replied "[n]o." *Id*. at 13. Officer Ruby, when asked what Swayzer said to him, testified "I think he told me something along the lines of he was looking at his phone or something like that and that he had been staying in his car." *Id*. at 20.

[4] Swayzer testified that he had been living in his car and parked in the shopping center's parking lot to take a nap. He stated "I seen her pull in, but it was so much going on in that moment because my car had literally got shotten up the day before," "I had to call off work because literally that morning they shot at my car and flattened my tires," and "it was, like, a red SUV." *Id*. at 25. He indicated that he pulled into the parking lot and "was just laying back . . . looking at [his] phone." *Id*. When asked "[d]id you pull beside her or did she pull beside you," he testified "her story is correct" and "I pulled up beside her to see who it was." *Id*. at 26. When asked "[d]id you roll down your window," he replied affirmatively. *Id*. He indicated that he was not masturbating. He

stated "when I pulled up beside her I just had my hand on my gun" and "as soon as she pulled off, I just went about my day." *Id*. at 26-27. When asked "you backed up and pulled right next to her," Swayzer replied: "Yes. So, her story is highly correct. It's the masturbating part that was incorrect." *Id*. at 29. He testified Pursley's window was down. When asked "from two parking spots away you couldn't see that it was a woman in the car," he answered: "No. My windows are tinted and I was at a, like a angle behind her a little bit so and I didn't want to pull up so I just backed up and pulled beside her just to see." *Id*. The court asked Swayzer "you didn't tell the police officer that she must have mistaken masturbating for your weapon," and he replied "I did" and "I wrote it in my statement, as well." *Id*. at 30. The State presented Swayzer's written statement to police which did not reference a handgun. The State recalled Pursley, and she testified that her vehicle was gray and not a red SUV. The court stated that it considered the testimony of Pursley and Swayzer, found Pursley's testimony to be considerably more credible than Swayzer's testimony, and found Swayzer guilty as charged. The court sentenced Swayzer to 365 days, all suspended to supervised probation.

Discussion

[5] When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. *Id*. We consider conflicting evidence most favorably to the trial court's ruling. *Id*. We affirm the conviction

unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. A conviction may be sustained on the uncorroborated testimony of a single witness or victim. *Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007), *trans. denied*.

[6] Ind. Code § 35-45-4-1(a) provides that "[a] person who knowingly or intentionally, in a public place: . . . (4) fondles the person's genitals or the genitals of another person; commits public indecency, a Class A misdemeanor."

[7] Swayzer asserts that, "[a]lthough it appears that the evidence most favorable to the verdict would indicate that [he] was in a 'public place,' [he] was not in a 'public place.'" Appellant's Brief at 7. He argues that he was inside his vehicle, that "[his] windows were tinted and so much so that he had to park right next to Pursley's vehicle and roll down his window in order to see the driver of Pursley's vehicle," and that he was "laying back in the seat." *Id*. at 8. He argues that "[his] vehicle had a partition (made of his car's body, windows, and window tinting) of sufficient height such that any conduct or condition inside the vehicle was not visible to the casual public eye." *Id*. at 9. He cites *Chubb v. State*, 640 N.E.2d 44 (Ind. 1994), *reh'g denied*, and argues: "Much like the police officer in *Chubb* that looked over the partition at Chubb while Chubb was masturbating, Pursley 'looked over' Swayzer's partition to see inside his vehicle." *Id*. He also argues there was no testimony that anyone other than Pursley would have been able to see what occurred inside his vehicle.

[8] The State argues that Swayzer's car was in a parking lot open to the public and "the interior of his car was open to the public's view." Appellee's Brief at 7. It argues that "Swayzer and Pursley both testified that Swayzer rolled down the front passenger window of his car." *Id*. at 8-9. It contends: "A tinted window is not necessarily impossible to see into, but even assuming the car's windows were tinted sufficiently to otherwise make the interior of the car completely unviewable, Swayzer's conscious decision to roll down his front passenger window made the interior of his car visible to Pursley and the public." *Id*. at 9. It states "[t]he reasonable inferences of the evidence show that Swayzer and his conduct inside the car was [sic] viewable to those in the parking lot and thus he was in a public place." *Id*.

[9] "[A] public place is any place where members of the public are free to go without restraint." *Long v. State*, 666 N.E.2d 1258, 1261 (Ind. Ct. App. 1996). When determining whether a place is a "public place" within the meaning of the statute, one factor we consider is whether it is "reasonably foreseeable" someone will potentially witness the conduct. *Lasko v. State*, 409 N.E.2d 1124, 1129 (Ind. Ct. App. 1980). The purpose of the public indecency statute is "to protect the non-consenting viewer who might find . . . a spectacle repugnant." *Thompson v. State*, 482 N.E.2d 1372, 1375 (Ind. Ct. App. 1985) (quoting *Lasko*, 409 N.E.2d at 1128).

[10] In *Chubb v. State*, the defendant was in a public men's restroom in a shopping mall, and a police officer approached a urinal adjacent to three stalls with partitions and doors. 640 N.E.2d at 46. The officer looked over the partition

into the first stall, where the defendant lowered his pants, sat down, and began to masturbate. *Id*. The officer left the restroom and soon afterwards returned to the urinal next to the defendant's stall. *Id*. After the other restroom occupants left, the defendant stood up, reached over the partition, and began to rub the officer's chest. *Id*. The defendant then, continuing to masturbate, motioned for the officer to come around to the stall next to the defendant's stall. *Id*. When the officer obliged, the defendant reached over the partition and began to fondle the officer's genitals. *Id*. Charged with appearing in a public place in a state of nudity and there fondling the genitals of another, the defendant was convicted of public indecency. *Id*. On appeal, the defendant argued that he was not in a "public place" as required for the offense of public indecency. *Id*.

[11] The Indiana Supreme Court held that as a general matter, "a restroom stall, enclosed by partitions of sufficient height so that users' conduct or condition is not visible to the casual public eye, is not a public place." *Id*. at 47. The Court stated "[t]he defendant's genital nudity in the closed stall did not constitute public indecency" and "[t]o hold otherwise would effectively render the ordinary use of a public restroom a crime."[1] *Id*. The Court went on to observe that the charging information alleged not only genital nudity but also the fondling of another person's genitals, the officer testified such an act occurred

[1] At the time *Chubb* was decided, Ind. Code § 35-45-4-1(a)(3) criminalized knowingly or intentionally appearing in a state of nudity in a public place under any circumstances. In 2003, the legislature modified that part of the public indecency statute to provide that it was a crime to appear in a state of nudity in a public place only if the person had "the intent to arouse the sexual desires of the person or another person." *See* Pub. Law No. 123-2003, § 2 (eff. July 2003) (amending Ind. Code § 35-45-4-1(a)(3)).

while the defendant was reaching across the stall partition, and "[s]uch conduct exceeded the bounds of the private area and thereby constituted criminal conduct in a public place."[2] *Id*. The Court also observed that a photographic exhibit showed that "the top of the restroom stall partition reached a height only slightly above the defendant's armpits when he was standing flat-footed" and the jury could reasonably have found the defendant committed the act described by the officer. *Id*. The Court also noted: "In the present case, the defendant was not charged with fondling himself or another within the same stall. By our decision today, we do not imply that such conduct would fail to satisfy the 'public place' element of the public indecency statute if accompanied by audible sounds, visible movement, or otherwise imposing upon the public." *Id*. at 47 n.3.

[12] Swayzer does not argue that he did not knowingly or intentionally fondle his genitals in his vehicle in the shopping center's parking lot. Nor does he claim the parking lot was not a public place. He asserts only that he was not in a public place because he was inside his car and his windows were tinted. The evidence most favorable to the trial court's ruling reveals that, in the middle of the day, Swayzer pulled his vehicle into a parking space immediately adjacent to Pursley's vehicle such that his front passenger window was next to her driver's window and rolled down his front passenger window, which caused

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[2] At the time of the offense in *Chubb*, Ind. Code § 35-45-4-1(a)(4) provided that "[a] person who knowingly or intentionally, in a public place . . . fondles the person's genitals or the genitals of another person . . . commits public indecency, a Class A misdemeanor."

Pursley to look, and she saw him "with . . . his penis in his right hand masturbating." Transcript Volume II at 7. When asked if "that was the window closest to where you were sitting," Pursley replied "[y]es." *Id*. at 8. Swayzer testified "I pulled up beside her to see who it was," *id*. at 26, that he rolled down his window, and that "[h]er window was down." *Id*. at 29. Pursley testified she was "absolutely sure" that Swayzer had his penis in his hand. *Id*. at 13. While Swayzer commented that his windows were tinted, the court also heard evidence regarding the location of Swayzer's vehicle in the shopping mall parking lot and relative to Pursley's vehicle, the time of day, and that both Pursley's window and Swayzer's passenger window were rolled down. We do not find Swayzer's argument, under these circumstances, that his vehicle was similar to an enclosed restroom stall to be persuasive. A trier of fact could determine from the evidence that it was "reasonably foreseeable" that someone would witness Swayzer's conduct, *see Lasko*, 409 N.E.2d at 1129, and that his conduct "exceeded the bounds of the private area" and "constituted criminal conduct in a public place." *See Chubb*, 640 N.E.2d at 47. Based on the record, we conclude that evidence of probative value was presented from which the trial court could find beyond a reasonable doubt that Swayzer committed the offense of public indecency as a class A misdemeanor.

[13] For the foregoing reasons, we affirm.

[14] Affirmed.

Riley, J., and Foley, J., concur.

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