IN THE COURT OF APPEALS OF IOWA

No. 3-168 / 11-0014
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID PAUL SPIVEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee, District Associate Judge.

A defendant appeals his conviction for indecent exposure claiming there was insufficient evidence to support his conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

David Spivey appeals from his conviction for indecent exposure, a serious misdemeanor, in violation of Iowa Code section 709.9 (2009). He claims there was insufficient evidence to support his conviction that he exposed himself to arouse the sexual desires of either party or that he exposed himself to someone who was not his spouse. As we find sufficient evidence to support both elements, we affirm his conviction.

I. BACKGROUND FACTS AND PROCEEDINGS.

Spivey was charged with indecent exposure. He waived a jury trial and stipulated to a bench trial on the minutes of testimony. The court found Spivey guilty, sentenced him to one year in jail, suspended that sentence, and placed him on probation for one year. Spivey was ordered to pay a $315 fine plus the surcharge, participate in the victim offender reconciliation program, participate in the sex offender treatment program, and register as a sex offender. The court also extended a no-contact order that was in place to protect the victim.

From the police reports attached to the trial information, the following facts can be gleaned. On December 15, 2009, a man approached a group of people in the parking lot of the Central Iowa Shelter. The victim was part of that group. The man asked the group if anyone was looking for work. He needed someone to pack and unload boxes for the day for $200. He seemed particularly interested in the two women of the group. The victim was the only one to get into the vehicle, and the man drove away. The victim's phone's GPS was activated before she left, and the other members of the group took down the vehicle's

license plate. The victim gave the man directions, but instead of turning right as the victim directed, he turned left into Gray's Lake. The man parked the vehicle in the parking lot and said "something to the effect of, 'How would you like to make another (an additional) $200 today?'" When the victim looked over she discovered the man had pulled out his penis and was gesturing for her to do something with it or come closer to him. The victim said no and demanded to be taken back to the shelter. The man replied that no one knew where she was. The victim then took out her cell phone and told the man that her GPS was activated so her friends knew where she was. The man looked scared, dropped the victim back near the shelter, and then sped away.

The victim and her fiancé were later approached by the same man again offering work, this time in the parking lot at DMACC. The man was wearing a blue polo shirt with a Karl Chevrolet logo on it. When the victim and her fiancé mentioned they had seen the man before, the man drove off.

The police were able to locate the vehicle using the license plate information provided by the victim and her friends. It was registered to a David and Melissa Spivey. The police provided a photographic lineup to the victim who stated that Spivey's photo had an "uncanny resemblance" to the man who approached her. The police contacted Spivey who admitted the vehicle was his and he was the only person to drive it. He also worked for Karl Chevrolet. Spivey denied being in the parking lot of the shelter or offering people jobs. He denied that a female ever got into his van, though he did say exposing one's genitals to a stranger would be offensive.

II. INDECENT EXPOSURE—SUFFICIENCY OF THE EVIDENCE.

To prove Spivey guilty of indecent exposure, the State had to prove the following four elements:

> 1. The exposure of genitals or pubes to someone other than a spouse . . .;
> 2. That the act is done to arouse [or satisfy] the sexual desires of either party;
> 3. The viewer was offended by the conduct; and
> 4. The actor knew, or under the circumstances should have known, the victim would be offended.

See *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008); *see also* Iowa Code § 709.9. Spivey on appeal only challenges the evidence of the first and second elements—that the victim was not his spouse and that he exposed himself to arouse his or the victim's sexual desires. We review a sufficiency-of-the-evidence challenge for correction of errors at law. *Jorgensen*, 758 N.W.2d at 834. The district court's findings are binding on us if supported by substantial evidence, which is evidence that would "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Id*. We view all the evidence in the light most favorable to the judgment and "construe the findings of the trial court liberally to uphold, rather than defeat, the result reached." *State v. Talbert*, 622 N.W.2d 297, 301 (Iowa 2001).

A. Spouse. We find sufficient evidence to support the element that the victim in this case was not Spivey's spouse. The police report indicates the victim did not know the perpetrator, and after the first encounter only described for police what the perpetrator was wearing. When the victim encountered Spivey, she again did not know who he was but described his gender, age, skin

color, hair color, and clothing to police. When police were able to develop a lineup of suspects to show the victim, she picked out Spivey saying he had an "uncanny resemblance" to the perpetrator. In addition, the victim described another man as her fiancé at the time of the incidents. If Spivey was married to the victim, we conclude the victim would certainly have known who he was. We find this circumstantial evidence, when viewed in the light most favorable to the State, establishes the victim was not Spivey's spouse. "Circumstantial evidence is not inferior evidence because direct and circumstantial evidence are equally probative." *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984).

B. Arousal. We also find sufficient evidence to support the element that Spivey exposed himself to arouse or satisfy the sexual desires of either party. "The requisite intent to arouse or gratify the sexual desire of any person can be inferred from an accused's conduct, remarks, and all surrounding circumstances." *Jorgensen*, 758 N.W.2d at 837. The purpose to arouse or satisfy either party's sexual desires must occur at the time of the exposure to the viewer. *State v. Isaac*, 756 N.W.2d 817, 820 (Iowa 2008).

Here, Spivey unzipped his pants, pulled out his penis, and then asked the victim if she wanted to make an additional $200. He was "gesturing for her to do something with [his penis] or come closer to him." When the victim refused and demanded to be taken back to the shelter, he said, "What if I don't? Nobody knows where you are." Again, the circumstantial evidence supports the conclusion that Spivey sought to arouse or satisfy his sexual desire by exposing his genitals to a woman he picked up under false pretenses and soliciting her for

a sex act. While the evidence does not indicate whether or not Spivey's penis was erect when the victim saw it, based on Spivey's conduct and remarks, his sexual intent was clear. The law does not require actual arousal, only intent to arouse. This is not a case where the exposure of Spivey's penis was accidental or inadvertent, nor did Spivey's sexual intent evaporate when the victim saw him. *See id*. It was not until the victim showed him her phone with the GPS activated that Spivey's intent was thwarted.

Sufficient evidence supports the district court's decision, and we therefore affirm Spivey's conviction.

AFFIRMED.