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19-P-1710

Appeals Court

COMMONWEALTH vs. JOHNATHAN PASQUARELLI.

No. 19-P-1710.

Essex. May 13, 2020. - November 20, 2020.

Present: Green, C.J., Maldonado, & Blake, JJ.

Open and Gross Lewdness and Lascivious Behavior. Police Officer.

Complaint received and sworn to in the Salem Division of the District Court Department on February 28, 2018.

The case was heard by Robert A. Brennan, J.

A motion for stay of execution of sentence, filed in the Appeals Court on November 15, 2019, was heard by Sacks, J.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Kathryn E. Leary, Assistant District Attorney, for the Commonwealth.

MALDONADO, J. After a bench trial, the defendant, Johnathan Pasquarelli, was convicted of open and gross lewdness and lascivious behavior in violation of G. L. c. 272, § 16. The

sole issue on appeal is whether -- as a matter of law -- it is objectively unreasonable for a police officer to be "shocked" or "alarmed" by exposure to the specific conduct that the officer sought to uncover in the investigation.¹ We conclude that a police officer's shock or alarm in such circumstances is not objectively unreasonable as a matter of law and affirm the defendant's conviction.

Background.² After receiving numerous reports of a male "flashing" female victims, two detectives from the Salem Police Department conducted an undercover operation designed to "catch the person in the act." Detective Charlene Sano, a female officer, posed in plain clothes as an unsuspecting pedestrian. A second detective, also in plain clothes, performed surveillance from an unmarked cruiser. The detectives stationed themselves in downtown Salem. While stationed there, they witnessed a vehicle, which matched the description of the perpetrator's vehicle, repeatedly drive in a loop around the

¹ In November 2019, the defendant filed a motion for stay of execution of his sentence in this court, which a single justice denied. The defendant's appeal from the order denying that motion was consolidated with the appeal from his conviction. Our decision here renders the defendant's appeal from the single justice's order moot. See Commonwealth v. Berrios, 84 Mass. App. Ct. 521, 522 n.1 (2013).

² We summarize the facts in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

downtown area. After the driver first parked his vehicle, Sano got out of the unmarked cruiser and began walking up and down the street.

There were only a few other pedestrians in the area. During the course of an hour, the driver drove his vehicle past Sano over twenty-five times. Sano was able to see that the driver was a male with dark facial hair who was wearing glasses and a hooded sweatshirt. The driver also parked and got out of his vehicle a few times; he walked by Sano a couple of times and poked his head around a building a couple of times. Based on this contact, Sano was able to see the driver's full face and provide a more complete description of the driver as a white male with a dark full beard, wearing glasses, a blue hooded sweatshirt, blue jeans, and black and white sneakers. When Sano stopped at a well-lit intersection to talk on her cell phone to the surveillance officer, the driver approached Sano and said, "[E]xcuse me." Then lifting his sweatshirt and exposing his genitals, he said, "[C]an you put this in your mouth?" Sano screamed to the surveillance officer, "[H]e just did it, he just did it, he just exposed himself." At trial, the surveillance officer testified that Sano's tone of voice was "fearful, shocked," and "surprised." When the driver began to run away, Sano and the surveillance officer ran after him and apprehended him at his vehicle. The driver was subsequently identified as

the defendant. At trial, Sano testified that she "saw [the defendant's] penis and his testicles, completely exposed," which made her feel "shocked" and "[e]xtremely uneasy."

Discussion. To establish the crime of open and gross lewdness and lascivious behavior, the Commonwealth must prove five elements: "the defendant (1) exposed genitals, breasts, or buttocks; (2) intentionally; (3) openly or with reckless disregard of public exposure; (4) in a manner so 'as to produce alarm or shock'; (5) thereby actually shocking or alarming one or more persons." Commonwealth v. Maguire, 476 Mass. 156, 158 (2017), quoting Commonwealth v. Swan, 73 Mass. App. Ct. 258, 260-261 (2008). Here, the defendant challenges only the fourth element. The Supreme Judicial Court has clarified that the fourth element "[r]equir[es] the Commonwealth to demonstrate that [the victim's] 'shock' or 'alarm' was an objectively reasonable reaction in the circumstances of the conduct." Maguire, supra at 161.

In Maguire, the Supreme Judicial Court concluded that the police officer's testimony that "he was 'disgusted' after viewing the defendant's exposed penis, not for himself, but rather out of 'concern' for the women seated [nearby]," was insufficient to satisfy the fifth element that the officer was subjectively "shocked" and "alarmed." Id. at 159-160. As a result, the court did not reach the question whether a police

officer's subjective reaction of "shock" or "alarm" in the circumstances was objectively reasonable.³ Still, Maguire is not devoid of guidance on this issue.

In Maguire, the Supreme Judicial Court noted that Commonwealth v. Pereira, 82 Mass. App. Ct. 344 (2012), "did not address whether, as an objective matter, there was evidence to demonstrate that it was reasonable for an experienced police officer to be 'shocked and alarmed' by the conduct." Maguire, 476 Mass. at 160 n.1. The court then cited, by analogy, Revere v. Aucella, 369 Mass. 138, 142-143 (1975), appeal dismissed sub nom. Charger Invs., Inc. v. Corbett, 429 U.S. 877 (1976), with a parenthetical stating that "G. L. c. 272, § 16, may not constitutionally apply where there is no imposition of 'lewdness or nudity on an unsuspecting or unwilling person.'" Maguire, supra, quoting Revere, supra. The defendant urges this court to interpret the analogy as a holding that it is objectively unreasonable for a police officer to be shocked or alarmed by exposure to conduct that the officer sought and anticipated. We disagree.

The Supreme Judicial Court's refusal in Revere, 369 Mass. at 147, to apply G. L. c. 272, § 16, to a nude dance

³ Because Sano testified explicitly that she was "shocked," the defendant here does not challenge the fifth element, whether she was subjectively shocked or alarmed.

establishment "where there is no imposition of the behavior on an unsuspecting or unwilling person" illustrates a historic requirement that the witness's reaction to the conduct be objectively reasonable. The analogy in Maguire, therefore, supports the imposition of an objective requirement as an element of the crime. It does not, however, decide whether an officer's shock or alarm during an investigation is objectively unreasonable.

We turn then to the Supreme Judicial Court's discussion of the objective requirement of shock or alarm in Maguire, 476 Mass. at 161. In imposing an objective requirement, the Supreme Judicial Court cited cases involving criminal harassment, G. L. c. 265, § 43A (a), and accosting or annoying a person of the opposite sex, G. L. c. 272, § 53. Id. In both instances, the objective requirement is analyzed under a "reasonable person" standard. See Commonwealth v. Sullivan, 469 Mass. 621, 625 (2014) (under G. L. c. 272, § 53, "the Commonwealth has to prove that the defendant's behavior was offensive and disorderly to a reasonable person. This is an objective standard" [quotation and citations omitted]); Commonwealth v. Braica, 68 Mass. App. Ct. 244, 246 (2007) (under G. L. c. 265, § 43A [a], "[i]f the acts would not cause a reasonable person to suffer substantial emotional distress, the subjective reaction is insufficient" [quotation and citation omitted]). See also Commonwealth v.

Bigelow, 475 Mass. 554, 561-565 (2016) (letters sent to elected official insufficient to support criminal harassment conviction because, as politician, he should expect to get "mail from disgruntled constituents" and because he was not seriously alarmed by letters).

We recognize that the reasonable person standard differs from the reasonable officer standard. See, e.g., Commonwealth v. Ortiz, 478 Mass. 820, 824 (2018) (standard for interpreting scope of consent to search "is that of a typical reasonable person, not a typical reasonable police officer"). In instances in which an officer experiences fear for her safety or the safety of others, courts have applied the reasonable person standard. See Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 n.7 (1997) ("A police officer does not have to testify specifically that he was in fear of his own safety so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger" [emphasis added]); Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 314 (2013) ("An officer is entitled to take reasonable precaution for his own safety if the facts warrant a reasonable person believing the suspect to be armed").⁴

⁴ Other circumstances in which the reasonable person standard, rather than the reasonable officer standard, is applied include when determining whether an individual has authority to consent to an officer's entry into a premises, see

"[T]he central purpose of G. L. c. 272, § 16, [is] one of preventing fright and intimidation." Commonwealth v. Ora, 451 Mass. 125, 128 (2008). An officer is not immune -- either by nature of her position or by nature of the investigation she is conducting -- to feelings of fright. See State v. Wood, 180 Ariz. 53, 66 (1994), cert. denied, 515 U.S. 1147 and 515 U.S. 1180 (1995) ("Police officers, of course, are not immune from the fear that anyone would reasonably feel . . ."). We would not tell an officer responding to a report of an armed suspect that feelings of fear on being confronted with a gun are unreasonable. Nor would we dismiss the shock an officer may experience on arriving at a bloody murder scene. We likewise decline to conclude that as a matter of law an officer's shock or alarm when accosted by a suspect engaging in lewd behavior, even if anticipated, are objectively unreasonable. The question whether an officer's shock or alarm was objectively reasonable

Commonwealth v. Lopez, 458 Mass. 383, 393 (2010) ("consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" [quotations and citation omitted]), and whether a government official is shielded from liability for civil damages, see LaChance v. Commissioner of Correction, 463 Mass. 767, 777 (2012), S.C., 475 Mass. 757 (2016) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" [quotation and citation omitted]).

is a question best left for the fact finder. See Maguire, 476 Mass. at 161.

Further, we conclude that the evidence on the fourth element was sufficient to support the defendant's conviction. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979) (court reviews claim of insufficient evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" [quotation and citation omitted]). The fourth element requires that the Commonwealth prove that the defendant's intentional and open or reckless exposure of his genitals was done "in a manner so as to produce alarm or shock" (quotation and citation omitted). Maguire, 476 Mass. at 158. "[T]he objective reasonableness of [Sano's] subjective reaction . . . is the focus of the fourth element." Id. at 159. Specifically, the question is whether Sano's shock "was an objectively reasonable reaction in the circumstances of the conduct." Id. at 161. Here, the defendant drove his vehicle past Sano over twenty-five times as he repeatedly circled the neighborhood; it was after 9 P.M. and there were only a few people around; the defendant walked past Sano a couple of times and poked his head around a building a couple of times; and he then approached Sano, expressly called for her attention, and exposed his genitals.

We think this evidence was sufficient to establish that Sano's shock "was an objectively reasonable reaction," id., and thus sufficient to satisfy the fourth element.

Conclusion. The judgment is affirmed. The appeal from the single justice order denying the motion for stay of execution of sentence is dismissed as moot.

So ordered.