# In the
# Court of Appeals
# Second Appellate District of Texas
# at Fort Worth

---

No. 02-20-00003-CR

---

KALEN GATLIN, Appellant

V.

THE STATE OF TEXAS

---

On Appeal from County Criminal Court No. 8
Tarrant County, Texas
Trial Court No. 1542244

---

Before Kerr, Birdwell, and Bassel, JJ.
Memorandum Opinion by Justice Bassel

## MEMORANDUM OPINION

### I. Introduction

Appellant Kalen Gatlin was convicted by a jury of the offense of indecent exposure and sentenced by the trial court to serve 180 days in the Tarrant County Jail. Appellant raises two points of error. First, he contends that the evidence is insufficient to establish that he exposed his genitals while acting with an intent to arouse or gratify his or another person's sexual desire. We overrule the first point because the complaining witness's description of Appellant's acts and a video portraying those acts provided evidence from which the jury could reasonably infer that Appellant had acted with the requisite intent. Second, Appellant contends that the trial court erred by failing to submit the lesser-included offense of disorderly conduct to the jury. We overrule the second point because the record does not contain evidence establishing that Appellant was guilty only of the offense of disorderly conduct. Accordingly, we affirm.

### II. Background

Appellant was charged by an amended information as follows:

> That [Appellant], hereinafter called defendant, in the county of Tarrant and state aforesaid, on or about the 23rd day of April 2018, did expose any part of the defendant's genitals with the intent to arouse or gratify the defendant's or any person's sexual desire, and said defendant was reckless about whether another was present who would be offended or alarmed by his act, in that he was touching and/or waving his exposed penis with his hand in a public place[.]

Appellant pleaded not guilty.

At trial, Complainant testified that she had entered the Fort Worth Transit Authority Trinity Metro bus station at 8:00 a.m. while traveling home from work. As Complainant sat down on a bench to wait for her bus, Appellant walked past her and mumbled something that she did not understand but that scared her. Appellant was apparently speaking to Complainant because when he mumbled, he was closer to her than to other people in the station. After Appellant passed Complainant, he went into the men's restroom; the door of the restroom was visible to Complainant from where she sat.

After Appellant entered the restroom, he came back out and was touching himself by making a circular motion over his genitals. Appellant then reentered the restroom and came out a second time. Appellant said, "Hey, lady," and Complainant was the only woman near Appellant. After hearing Appellant call out, Complainant turned and looked at him. Appellant was holding his penis and "was making it go up and down."

A security camera at the bus station made a close-up recording of those exiting the restroom. A video taken by that camera showed Appellant's stepping into the open door of the restroom while his belt was loosened and his pants were unzipped and lowered. The video shows Appellant exposing his erect penis, holding it by the base, and moving it up and down. Appellant walked forward as he exposed himself.

Complainant testified that Appellant had walked toward her until he was about nine or ten feet away. Complainant stated that she could see Appellant's "whole

privates." Appellant's actions scared Complainant, and she stated, "I thought that he was going to try to rape me." Complainant believed that Appellant was acting intentionally "[b]ecause of the way that he just went in there and pulled his pants down." Complainant confirmed that she had never met Appellant before the incident.

Complainant immediately reported the incident at the bus station's information desk. The person at the information desk told Complainant to call the police, and she did so. An off-duty police officer acting as a security guard arrived, viewed the security-camera footage, and arrested Appellant. Complainant reported that Appellant then claimed that he was not trying to "do anything" to her.

The officer testified that when Complainant spoke with him, "[s]he was very agitated and excited and nervous and embarrassed." Based on his training and experience, the officer testified that he "believed [Appellant] was exposing himself to offend people or enjoy it, you know."

The jury found Appellant guilty of "the offense of indecent exposure as charged." The trial court found an enhancement paragraph to be true and sentenced Appellant to 180 days in the Tarrant County Jail.

## III. Point of Error No. 1—Appellant contends that the evidence is not sufficient to establish that he acted with an intent to arouse or gratify a sexual desire.

In his first point, Appellant asks that we accept a premise that a jury cannot reasonably infer a male acts with an intent to arouse or gratify the sexual desire of

himself or that of another when the male exposes and then manipulates his erect penis in a public place, draws a stranger's attention to his act, and then walks toward her while continuing to manipulate himself. Such an argument fails.

**A. Standard of review**

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). The trier of fact holds the responsibility to resolve conflicts in the testimony fairly, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The difference between drawing a reasonable inference (which is permissible) and speculation (which is not) is explained as follows:

> [A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

*Hooper*, 214 S.W.3d at 16. Further, we resolve inconsistencies in the testimony in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

**B. Elements of the offense of indecent exposure**

The offense of indecent exposure occurs when "[a] person . . . exposes . . . any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." Tex. Penal Code Ann. § 21.08(a).

**C. Sufficiency analysis**

Appellant argues that the evidence is insufficient to establish the element that he acted with intent to arouse or gratify his sexual desire or that of others because neither Complainant nor the officer testified that he had acted with that intent. He also argues that he had told Complainant that he did not intend to "do anything" to her and that the officer thought that Appellant had wanted to offend people or to enjoy himself. This argument turns on the premise that the jury could infer nothing about intent from Appellant's actions and thus that the jury had engaged in impermissible speculation in gauging Appellant's intent. This argument ignores how the intent-to-arouse-or-gratify element is proved in general and in particular for the offense of indecent exposure.

Starting with the general, "the intent to arouse or gratify . . . may be inferred from acts, words, and conduct of the accused." *See Hamilton v. State*, No. 11-14-00194-CR, 2015 WL 4053368, at *2–3 (Tex. App.—Eastland July 2, 2015, no pet.) (mem. op., not designated for publication) (citing *Jackson*, 443 U.S. at 318–19, 99 S. Ct. at 2789, *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010), *Hooper*, 214

S.W.3d at 13, and *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd)).

Moving to the particular, it is reasonable to infer that a male is acting with an intent to arouse or gratify a sexual desire when he engages in a display to a stranger that is a physical manifestation of sexual arousal. *See Malcolm v. State*, No. 05-17-01488-CR, 2019 WL 2521717, at *4 (Tex. App.—Dallas June 19, 2019, pet. ref'd) (mem. op., not designated for publication) (holding that male's calculated effort to expose his penis to a stranger in a grocery store was evidence of intent); *Hooten v. State*, Nos. 05-13-00562-CR, 05-13-00687-CR, 2014 WL 2583673, at *2 (Tex. App.—Dallas June 10, 2014, pet. ref'd) (mem. op., not designated for publication) ("J. testified appellant had an erection, which indicates he was intending to arouse or gratify his sexual desire at the time he was exposing himself."); *Metts v. State*, 22 S.W.3d 544, 547 (Tex. App.—Fort Worth 2000, pet. ref'd) (holding evidence sufficient to support conviction for indecency when "appellant was naked from the waist down, . . . appeared to be masturbating, and . . . continued to stare at [witness] as he did so"); *Claycomb v. State*, 988 S.W.2d 922, 925 (Tex. App.—Texarkana 1999, pet. ref'd) (holding evidence sufficient to establish intent to arouse or gratify a sexual desire when individual was looking at passing family while exposing his erect penis). Unlike the verbal descriptions in the cited cases, the jury in this case was subjected to a video recording depicting Appellant's behavior and demonstrating his intent. The recording provided the jury with evidence that made Appellant's intent manifest.

Accordingly, we overrule Appellant's first point.

## IV. Point of Error No. 2—Appellant contends that the trial court erred by failing to submit the lesser-included offense of disorderly conduct to the jury.

In his second point, Appellant contends that there was evidence that he was guilty only of the offense of disorderly conduct. The evidence that Appellant cites negates none of the elements of indecent exposure and fails to establish that a rational jury could find Appellant guilty of only the lesser offense of disorderly conduct.

### A. We set forth the standards to determine whether a lesser-included offense should be submitted to the jury.

We analyze two steps to determine whether an appellant was entitled to a lesser-included-offense instruction: (1) Are the elements of the lesser-included offense included within the proof necessary to establish the charged offense's elements? (2) Is there evidence in the record from which a jury could find the defendant guilty of only the lesser-included offense? *State v. Meru*, 414 S.W.3d 159, 161 (Tex. Crim. App. 2013); *Hall v. State*, 225 S.W.3d 524, 528, 535–36 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993).

The first step in the lesser-included-offense analysis is a legal question and does not depend on the trial evidence. *Hall*, 225 S.W.3d at 535. This step compares the elements of the offense as alleged in the information with the elements of the requested lesser offense. *Meru*, 414 S.W.3d at 162. The requested lesser offense must meet the requirements of at least one of the four types of lesser offenses described in Article 37.09 of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. Ann.

art. 37.09; *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). An offense is a lesser-included offense under Article 37.09(1) of the Texas Code of Criminal Procedure if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Tex. Code Crim. Proc. Ann. art. 37.09(1).

Under the second step, "there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense." *Ritcherson v. State*, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018) (citing *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016), and *Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006)). That requirement is met if there is "(1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense." *Id.* (citing *Saunders v. State*, 840 S.W.2d 390, 391–92 (Tex. Crim. App. 1992)). "The evidence raising the lesser offense must be affirmatively in the record." *Id.* "That is, a defendant is not entitled to a lesser-included offense instruction based on the absence of evidence, and the evidence must be 'directly germane to the lesser-included offense.'" *Id.* (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)).

Generally, in making the determination of whether a lesser-included offense should have been submitted, "[w]e consider all the evidence admitted at trial, not just the evidence presented by the defendant, and if there is more than a scintilla of

evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction." *Id.* (citing *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017), and *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). In other words, the evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Hall*, 225 S.W.3d at 536. This is a fact determination based on all the evidence presented at trial. *Meru*, 414 S.W.3d at 163. We cannot "pluck[] certain evidence from the record and examin[e] it in a vacuum." *Ritcherson*, 568 S.W.3d at 677. If anything more than a scintilla of evidence raises a fact issue of whether the defendant is guilty only of the lesser offense—regardless of whether the evidence is weak, impeached, or contradicted—we must conclude that the trial court erred by failing to give an instruction on the lesser-included offense. *See id.*; *Hall*, 225 S.W.3d at 536.

**B. The State concedes that a comparison of the elements of disorderly conduct to the elements of the offense of indecent exposure establishes that the former offense is a lesser-included offense of the latter.**

As noted above, a person commits indecent exposure "if he exposes . . . any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." Tex. Penal Code Ann. § 21.08(a). The elements of disorderly conduct are as follows: "A person . . . intentionally or knowingly . . . exposes his . . . genitals in a

public place and is reckless about whether another may be present who will be offended or alarmed by his act." *Id.* § 42.01(a)(10).

The elements of the disorderly conduct statute are not an exact subset of the elements of indecent exposure because the disorderly conduct statute requires the exposure to occur in a public place while the indecent-exposure statute does not, and intent to arouse or gratify the sexual desire is not an element of disorderly conduct. Here, however, the information alleged that the exposure occurred in a public place. The State concedes that "the statutory elements are identical but for the element of indecent exposure which requires the intent to arouse or gratify the sexual desire of a person. Thus, the offense of disorderly conduct is a lesser-included offense to the charged offense, and the first step of the analysis is satisfied." With this concession, we will assume, without deciding, that the first step of the lesser-included analysis is satisfied.

**C. Appellant was not entitled to an instruction on the lesser-included offense of disorderly conduct because the evidence he cites does not negate the evidence that demonstrated his intent to arouse or gratify a sexual desire, and the undisputed evidence of the manner by which he exposed himself would not have permitted the jury to find him guilty only of disorderly conduct.**

Based on the State's concession on the first step of the analysis, we turn to the second step in the lesser-included analysis and ask whether there is "(1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different

interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense." *Ritcherson*, 568 S.W.3d at 671. There is no evidence in the record before us that meets either of these conditions to warrant the submission of the lesser offense of disorderly conduct.

Appellant contends that the record supports a conclusion that disorderly conduct is a valid, rational alternative to the charged offense of indecent exposure. In essence, his argument appears to be that the trial record supports an inference that he only intentionally exposed himself and that he did not do so with an intent to arouse or gratify. This argument would require the jury to unsee Appellant's acts that were recorded by the security camera. That recording graphically portrays Appellant's intent, and the evidence he cites in an effort to wave away his demonstrated intent does not constitute more than a scintilla of evidence that "rais[es] the lesser offense and negat[es] or rebut[s] an element of the greater offense," i.e., the intent to arouse or gratify sexual desire contained in the indecent-exposure statute. *See id.*

The Tyler Court of Appeals disposed of an argument similar to Appellant's and held that it was not error for the trial court to deny a request to submit the lesser offense of disorderly conduct when a defendant was charged with indecent exposure. *See Kiser v. State*, No. 12-14-00093-CR, 2015 WL 5139361, at *3–4 (Tex. App.—Tyler Sept. 2, 2015, no pet.) (mem. op., not designated for publication). In *Kiser*, the appellant contended that the evidence that he was not masturbating when he exposed himself required the trial court to submit a charge on disorderly conduct. *Id.* at *3.

The Tyler court concluded that this evidence did not negate proof of the intent element of indecent exposure:

> Evidence of a defendant's masturbation or sexual arousal is not a prerequisite to proving the gratification element of indecent exposure because (1) the gratification element applies to "any person" and (2) the exposure is the precursor to the intended gratification. *See* Tex. Penal Code Ann. § 28.01. Thus, evidence that Appellant was not masturbating or sexually aroused when he exposed himself does not refute or negate the circumstantial evidence that proved the gratification element for indecent exposure. *See Saunders*, 840 S.W.2d at 391. Because this evidence does not refute or negate the other evidence establishing the greater offense, it also does not raise disorderly conduct as a lesser[-]included offense. *See id.* at 392.

*Id.* *Kiser* concluded that "[t]here must be affirmative evidence that both raises disorderly conduct as a lesser[-]included offense and rebuts or negates the gratification element of indecent exposure." *Id.*

The evidence that Appellant relies on here likewise does not negate the evidence that he acted with the intent to arouse or gratify nor is it susceptible to different interpretations—one of which negates that intent. The evidence that Appellant points to merely rehashes his sufficiency challenge on the issue of his intent to arouse or gratify a sexual desire:

> In this case there was evidence that Appellant displayed his genitals in order to offend people or because Appellant enjoyed doing so. Additionally, the jury heard that Appellant [had] told [Complainant], the woman who saw Appellant that day, that he was not trying to do anything to her when she saw his genitals. There was no testimony or evidence presented that proved that Appellant intended to arouse or gratify the sexual desire of any person. [Citations omitted.]

As in *Kiser*, this evidence does not negate visible and irrefutable proof that Appellant acted with the intent to arouse or gratify his sexual desire. *See id.*

Appellant's vague remark to Complainant that he was not trying to "do" anything to her does not refute or negate that he was acting with an intent to gratify a sexual desire of himself or another. The officer's vague statement that Appellant was trying "to offend people or *enjoy* it" does not negate the visible evidence that Appellant acted with an intent to arouse or gratify a sexual desire. The State did not bear a burden to offer a psychoanalysis establishing what underlying emotion produced Appellant's evident intent, and whether that intent was motivated or accompanied by a desire to offend or to enjoy does not negate the existence of the intent.

Further, the statute describing disorderly conduct specifies intentional or knowing exposure in a public place but, like the statute describing indecent exposure, specifies the mens rea of recklessness for whether a person who is present will be offended or alarmed. *Compare* Tex. Penal Code Ann. § 42.01(a)(10), *with* § 21.08(a). Appellant does not explain what evidence raises the issue that he was merely reckless regarding whether Complainant would be offended or alarmed by his exposure. The evidence is irrefutable that his act was not reckless; instead, he intentionally targeted Complainant.

Indecent exposure and disorderly conduct have similar elements because neither requires "proof that the defendant recklessly exposed himself; they require

proof that he *intentionally* [or, in the case of disorderly conduct, intentionally or knowingly] exposed himself." *Shaw v. State*, No. 03-99-00253-CR, 2000 WL 329256, at *2 (Tex. App.—Austin Mar. 30, 2000, pet. ref'd) (not designated for publication). "Recklessness arises [in both statutes] only in the inquiry into the defendant's mental state as to the presence of possible witnesses to his intentional behavior." *Id.*[1]

But a person who intentionally targets another with his offending conduct cannot claim that the conduct was merely reckless as to whether the person would be offended or alarmed by the exposure. In two opinions, the Texas Court of Criminal Appeals dealt with an analogous situation to ours in which a defendant sought the submission of indecent exposure as a lesser-included offense of indecency with a child. *See Briceno v. State*, 580 S.W.2d 842 (Tex. Crim. App. [Panel Op.] 1979); *Bowles v. State*, 550 S.W.2d 84 (Tex. Crim. App. 1977). *Briceno* held that indecency with a child is a lesser-included offense of indecent exposure. 580 S.W.2d at 844; *see also Ex parte Amador*, 326 S.W.3d 202, 208 (Tex. Crim. App. 2010) (reaffirming holding of *Briceno*

---

[1]The statutory definition of the culpable mental state of recklessness is as follows:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Tex. Penal Code Ann. § 6.03(c).

that indecency with a child is a lesser-included offense of indecent exposure). But the question in both *Briceno* and *Bowles* was whether the lesser-included offense of indecent exposure should have been submitted when the evidence was undisputed that the defendant intentionally targeted the exposure to the person who was offended or alarmed. *Briceno* cited *Bowles* for the proposition that the submission of the lesser-included offense was not warranted because the evidence did not support an inference that the defendant acted only with recklessness regarding whether a person witnessing his act would be offended or alarmed:

> In *Bowles v. State*, . . . there was no evidence that the defendant was reckless about the presence of another since it was undisputed that he [had] intentionally exposed himself. There the trial court's refusal to charge on the lesser[-]included offense of indecent exposure was held to be proper.

*Briceno*, 580 S.W.2d at 844 (citing *Bowles*, 550 S.W.2d at 86).

Again, with respect to the culpable mental state associated with whether the person's conduct will offend or alarm a person who is present, the evidence did not negate an element of indecent exposure nor was it open to two different interpretations—one of which negated an element of the greater offense and raised the lower. Here, it is undisputed that Appellant acted intentionally and not recklessly in his actions that alarmed or offended Complainant. There is no evidence in the record before us that gives Appellant an argument that the manner in which he exposed himself created a rational alternative for the jury to find him guilty of disorderly conduct but not indecent exposure.

Accordingly, we overrule Appellant's second point.

## V. Conclusion

Having overruled Appellant's two points, we affirm the trial court's judgment.

/s/ Dabney Bassel

Dabney Bassel
Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: July 9, 2020