UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0748

September Term, 2015

MARIO AMARO

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed:

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Mario Amaro, was convicted of indecent exposure by a jury in the Circuit Court for Montgomery County (Dugan, J.). He was sentenced to three years imprisonment under the jurisdiction of the Division of Correction. From the conviction and sentence, appellant filed the instant appeal in which he raises the following issue for our review, which we quote:

Was the evidence insufficient to sustain appellant's convictions?

FACTS AND LEGAL PROCEEDINGS

On July 4, 2014, Leticia Thiombiano,[1] accompanied by her two daughters (including eight-year-old Naomi Thiombiano) and her infant son, boarded a public bus *en route* to keep a doctor's appointment. Due to the crowded nature of the bus, Ms. Thiombiano held her baby in her lap and her other daughter sat next to her. According to Ms. Thiombiano, Naomi sat "on the other side" of the bus and she "frequently" turned to look at her daughter.

Naomi testified that appellant sat next to her and, at some point during the bus ride, he started "wiggling his private part" with his hands "inside his pants for a couple of minutes." More specifically, the following testimony was elicited:

> [STATE'S ATTORNEY]: Okay, and what did you see this man doing who sat next to you?
>
> [WITNESS]: Wiggling his private part.
>
> [STATE'S ATTORNEY] Wiggling his private part? Okay, and where were you, when you first got on the bus, were you looking out the window? Were you in a far

[1]We shall refer to the prosecuting witness, eight- year old Naomi Thiombiano, hereinafter, as "Naomi" and her mother, Leticia Thiombiano, as "Ms. Thiombiano."

corner? What were you doing when you first got on the bus before the person sat next to you?

[WITNESS] Looking out a window.

[STATE'S ATTORNEY]: And, after he sat next to you, at what point did he start wiggling his private part?

[WITNESS]: When he came to sat down [sic], in a couple of minutes.

[STATE'S ATTORNEY]: Within a couple of minutes of sitting next to you? And did you see which hand he used to touch his private part?

[WITNESS]: I just don't remember.

[STATE'S ATTORNEY]: Do you remember what type of clothes he was wearing all in terms of pants or shirt?

[WITNESS]: No.

[STATE'S ATTORNEY]: Okay, when you said that he was wiggling his private part, was he using his hands?

[WITNESS]: Yes.

[STATE'S ATTORNEY]: Okay, do you recall whether his pants were open or closed.

[WITNESS]: The zip was open.

[STATE'S ATTORNEY]: Did you see him open his zipper?

[WITNESS]: No.

[STATE'S ATTORNEY: No. Okay and do you recall how long he was wiggling his private part for?

[WITNESS]: Just a couple of minutes.

[STATE'S ATTORNEY]: And what did you do when you saw that?

> [WITNESS]: I did nothing, but when he came up [sic], I moved to my mom and then when it was time, when we got to the stop when we had to go home, and I told my mom.
>
> [STATES ATTORNEY]: Did he say anything to you?
>
> [WITNESS]: No.
>
> [STATE'S ATTORNEY]: Did you say anything to him?
>
> [WITNESS]: No.

Naomi was shown an anatomically-correct drawing which she identified as that of a "boy" and she answered in the affirmative when asked, "[d]o you think you can circle the private part you were talking about that you saw on this man?" Although the witness testified that she "did not know what that part of a body is called," she testified that the word that she uses in conversations with her mother in describing that part of the male anatomy is "private part." When asked whether the private part she saw on the bus was "a private part that [her brother] has or that [she had]," the witness responded that, "it's a part that looks like my brother's." When asked, "[d]o you remember the size of that private part? Was it small?" the witness responded, "[k]ind of big." When asked whether the man was wearing any underwear, the witness responded that she did not know. Finally, the witness reaffirmed that the first time she had ever seen appellant was on July 4, 2014, when he sat next to her on the bus and that the only other time she had seen appellant was three days after the incident under review, when she identified him again on a public bus.

Naomi told her mother what had happened after exiting the bus. Ms. Thiombiano then reported the incident to the transit police. Three days later Naomi and her family were on the same bus (the "Y8" in Montgomery Country, Maryland) when Naomi pointed appellant out to her mother, who then took a picture of appellant using her cell phone.

The State introduced into evidence a 30-minute video recording showing Ms. Thiombiano and her children from the time they boarded the bus to when they exited the bus. Although the video does not clearly depict the incident, both appellant and Naomi are visible.

At the conclusion of the State's case-in-chief, appellant's counsel made a motion for judgment of acquittal, arguing:

> Your Honor, at this time, I'd make a motion for judgment of acquittal. Your Honor has heard the testimony and had an opportunity to observe the video, which really shows absolutely nothing. And the testimony of the child, who is vague, doesn't give a lot of description, has some in[con]sistencies of it. I don't believe that the State has made a *prima facia* case for this to go to the jury.

The trial court denied the Motion at the conclusion of the evidence, opining as follows:

> All right, well, we had, looks like a family that travels on the bus with some regularity. In fact, they took the bus to the doctor's office that day and it was a rather long bus ride. I don't know if they change buses prior to getting where they took this most recent ride, but the child was, the video, of the bus itself, was about 30 minutes.
>
> And during the course of the 30 minute bus ride, you know, I didn't see a lot of movement in his arm or hand area until he took out the cell phone. And you know, I don't [know] whether it was before or after that time. It looked like, perhaps, there was more hand motion after the cell phone came out and the coat changed locations. But again, that's something that the jury's going to have to take a look at and make a determination.

I don't think I've ever seen eight-year-old spend so much time staring at the crotch area of a grown man as she certainly appeared to be doing on the video. She's consistent with respect to her location on the bus. And having defended and prosecuted cases with eight-year-olds, and knowing how eight-year-olds are, there's certainly all types of eight-year-olds. And it's difficult for an eight year old to sit up there and testify , in a courtroom, filled with adults, about something as embarrassing as the private parts.

And I grant you, Ms. Creedon, [appellant's counsel] you did a very good job of cross-examination, and she certainly did appear to be confused with respect to what was a girl's and what was a boy's private parts. But I'm satisfied that she knew the difference, and she demonstrated by circling a picture which had a boy's private parts on there, and she did it without any hesitation.

And, as I say, she reported this to her mother immediately after she got off the bus. this doesn't appear to be—it would be a very unusual situation, and it would such that, well, she didn't scream or call out. She certainly told her mother when she got off the bus. They regularly ride the bus. We know that because they saw the same guy two days later, and two days later, she says, There's the guy."

So I think, although there's certainly inconsistencies, even adults, we're frequently dealing with inconsistencies when they testify. Its unusual when everybody in a case testifies exactly the same. People perceive and see things differently.

So I certainly think there's no question but that she testified that she saw his private parts. That he was wiggling them around. If you watch where she looks, for most of the time on that video, it appears that she's staring at his crotch. Don't know what else would draw her attention to that area.

And so, I think that certainly, we don't look at the evidence in the light most favorable to the State at this point in time. Rather, look at the picture as a whole, and I have to, even giving the benefit of the doubt to the [appellant], I don't think I could find, at this point in time, that no reasonable juror could find guilt beyond a reasonable doubt. So I'm going to deny the motion for judgment of acquittal.

STANDARD OF REVIEW

The State must prove every fact necessary to establish a criminal offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 361 (1970); *Carroll v. State,* 428 Md. 679, 688 (2012). The reasonable doubt standard is high and exacting, requiring that evidence be adduced to allow the fact finder "to reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). In assessing whether the State has met this burden, the test is "whether, after considering 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.'" *State v. Albrecht,* 336 Md. 475,479 (1993) (quoting *Jackson*, 443 U.S. at 318-19) (Emphasis in original).

The Court of Appeals has observed:

> These principles are simpler in formulation than they are in application. When reviewing findings made by a trier of fact, there is a fine line between the improbable yet permissible inference and the legally unsupportable speculation. This distinction is all the more difficult in criminal cases, where the requirement that guilt be proved beyond a reasonable doubt is somewhat at odds with the deference owed to a fact-finder's determinations.

Bible v. State, 411 Md. 138, 156 (2009). The State must meet "its burden to establish appellant's guilt beyond a reasonable doubt [by] producing evidence from which the [fact-finder] was not required to speculate or engage in mere conjecture." *Morgan v. State,* 134 Md. App. 113, 139 (2000). While there is no distinction between direct and circumstantial evidence, a conviction may be based entirely upon circumstantial evidence only if "the

circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." *Jones v. State,* 395 Md. 97, 120 (2006) (quotations and citations omitted); *Taylor v. State,* 346 Md. 452, 458 (1997) ("A conviction resting on circumstantial evidence alone, however, cannot be sustained on proof amounting only to strong suspicion or mere probability."). Thus, "[i]f upon all of the evidence the defendant's guilt is left to conjecture or surmise, and has no solid factual foundation, there can be no conviction." *Id.*

DISCUSSION

Appellant contends that, based on Naomi's testimony, the jury could only speculate as to whether he committed the common law crime of indecent exposure. Specifically, appellant asserts that Naomi testified that she did not actually see his genitalia and could not discern whether or not appellant was wearing underwear. Appellant submits that Naomi's testimony "was consistent with the unfortunate habit of a male adjusting his genitals."

The State counters that the evidence is sufficient to support the jury's verdict. The State maintains that the eight-year old eyewitness testified that appellant was on a crowded, public bus, with the zipper of his pants down and that he "wriggl[ed] his private part," continuously for several minutes as he sat down next to her.

Judge Battaglia, writing for the Court of Appeals, set forth the requisite elements in a prosecution for establishing the crime of indecent exposure in *Wisneski v. State,* 398 Md. 578 593 (2007):

> Thus, our jurisprudence clearly sets forth the three elements of indecent exposure: a public exposure, made willfully and intentionally, as opposed to an inadvertent or accidental one; which was observed, or is likely to have been observed, by one or more persons, as opposed to performed in secret, or hidden from the view of others. Thus, by their very nature, the three elements are inextricably entwined, and our analysis of each one element enlightens our inquiry into the others.

In the case *sub judice,* appellant concedes that the incident that forms the basis of these proceedings occurred in a public venue, *i.e.*, a "crowded" public bus. He contends, however that, from the evidence presented, "the jury could only speculate as to whether appellant publicly *exposed* himself." (Emphasis added). Appellant specifically asserts that Naomi testified that appellant's "private part" was inside his pants and that "an exposure" could not be discerned from the 30-minute video tape. Therefore, appellant submits, the evidence presented was insufficient to support a jury's guilty verdict for indecent exposure. We disagree.

We are informed, by *Wisneski,* that our analysis of the three elements of indecent exposure requires a determination of how each element enlightens our inquiry into the others. As in the proof of criminal offenses, generally, the crime of indecent exposure involves establishing the *actus reus, i.e.,* the wrongful deed that comprises the physical components of a crime, in this case, "the exposure," and the *mens rea,* the defendant's state of mind.

Regarding whether the evidence was sufficient to establish the element of "a public exposure," Naomi testified that"the private part [she was] talking about that [she] saw" on appellant, and that "the private part she saw on the bus" was "a part that looks like [her]

brother's," but "kind of big." Moreover, although the trial judge determined, in rendering his decision to deny the motion for judgment of acquittal, that the exposure was not visible on the 30-minute video tape, he noted that, on the videotape, appellant's continuous hand movements in relation to the direction in which Naomi was staring, *i.e.*, at appellant's crotch and the inordinately unusual length of time that the child stared, could permit a rational jury, along with Naomi's testimony, to make a reasonable inference that appellant had indecently exposed himself. We agree.

Accordingly, Naomi's testimony and the 30-minute video tape also support the premise that the exposure was observed by an individual, *i.e.*, Naomi. The transcript, as noted, *supra*, indicates that Naomi, not only saw appellant's "private part," but that her vision was drawn to appellant's crotch area for an unusually long time. In conjunction with appellant's continuous hand movements, described in Naomi's testimony, and the fact that the witness' attention was fixated on the area of appellant's crotch as depicted in the 30-minute video, a rational jury could reasonably conclude that Naomi observed appellant's indecent exposure.

Appellant argues that, although the public bus was crowded, the State could provide only one witness who actually observed the incident. The number of observers, however, is a *non sequitur*. *Wisneski* requires that, for the element of observation to be satisfied, a defendant must be "observed, or is likely to have been observed, by *one or more persons*, as opposed to having performed the act in secret, or hidden from the view of others." (Emphasis

added). The evidence presented expressly illustrates that one person, Naomi, observed appellant exposing himself.

Once the *actus reus*, *i.e.*, the public exposure observed or likely to have been observed by one or more persons, has been established, the third and final element of the crime of indecent exposure, pursuant to *Wisneski*, is the element of intent. As *Wisneski* instructs:

> The element of intent can be express, or inferred from the circumstances and the environment of the exposure. When the defendant exposes himself at such a time and place that a reasonable person knows or should know that his or her act will be observed by others, his acts are not accidental and his intent may be inferred.

398 Md. at 593 (citing *Messina v. State*, 212 Md. 602, 606 (1957)).

At the outset, we address the State's characterization in its brief that Naomi testified that appellant "'wiggled his private part' *at her*." (Emphasis supplied) Evidence that appellant had directed his "wiggling" of his genitals at the witness would be direct evidence of the second element of the offense of indecent exposure, *i.e.*, that the exposure was made willfully and intentionally, as opposed to an accidental one. Contrary to this representation in appellee's submission to this Court, we have scoured the record and have been unable to confirm that appellant intentionally directed attention to his illicit behavior. In fact, young Naomi testified that appellant never looked at her or said anything to her and that he had been occupied talking on his cell phone during the bus ride. Our determination of whether the evidence is sufficient to establish that the "exposure" was made willfully and intentionally,

as opposed to an inadvertent or accidental one, however, does not end with the failure of appellant to overtly seek to draw attention to his elicit behavior.

As *Wisneski* further instructs:

> The intent element itself is infused with a "public" element in the distinction between accidental and wilfulness, as was explored in *Van Houten v. State*, 46 N.J.L. 16 (1884), a case in which the Supreme Court of New Jersey interpreted English common law, when faced with the situation in which the defendant had urinated outside in a place visible to the residents of several homes. The defendant challenged the following charge to the jury regarding the intent element, which the court determined to be the correct statement of the law:
>
> > [T]he testimony must show that the exposure was not merely accidental, and in order to convict the defendant you ought to be satisfied, from the testimony, that the exposure was intentional, at such time and place, and such manner as to offend against public decency; but intent may be inferred from recklessness. It is not necessary that some witness should testify that the defendant had said that he intended to commit the act; you can infer what he intended to do from what he actually did do.
> >
> > *Van Houten*, 43 N.J.L at 18-19.

Thus, reckless exposure, *determined by time, place and manner, can inform intent*. *Wisneski*, 398 Md. at 593–94. (Emphasis added).

In the case *sub judice*, appellant exposed himself, during the day on a crowded, public bus, while sitting next to someone, specifically a young girl. Even if, as appellant argues, Naomi witnessed the "unfortunate habit of a male adjusting his genitals," appellant was conducting his "unfortunate habit" with his zipper down, for several minutes, exposing himself to the eight-year old passenger seated next to him who was able to observe his "private part," and describe the genitalia as resembling her brother's, although larger. As in

Van Houten, as described in *Wisneski*, *supra*, appellant did not have to draw attention to his elicit behavior; the fact that the exposure occurred on a crowded, public bus further distinguishes it from mere accidental exposure. It is clear from the time, place and manner of appellant's exposure that a reasonable person should have known that his actions would have been observed by others. Therefore, the requisite intent can be inferred, as explicated in *Wisneski*, to establish the final element of indecent exposure.

Accordingly, we hold that the evidence presented, *i.e.*, Naomi's testimony and the 30-minute video, were sufficient to support the jury's verdict that appellant was guilty of indecent exposure.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.