Circuit Court for Baltimore City
Case No. 822076009

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 446

September Term, 2022

REGINALD GILLIE

v.

STATE OF MARYLAND

Arthur,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: April 6, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**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.

A jury in the Circuit Court for Baltimore City convicted Reginald Gillie, appellant, of indecent exposure and a fourth-degree sexual offense, and acquitted him of second-degree assault. He was sentenced to three years, all suspended, for indecent exposure and a consecutive but suspended one-year term for the sexual offense. He was placed on three years of probation, ordered to perform 40 hours of community service, and required to register as a sex offender.

In this timely appeal, we consider the scope of this common law crime, applying lessons from *Wisneski v. State*, 398 Md. 578 (2007), holding that a "public exposure" to a "casual observer" may occur in a private residence. Gillie presents four issues that we reorder and restate as follows:

1. Did the trial court abuse its discretion in admitting security camera video footage over Gillie's authentication objection?

2. Did the trial court abuse its discretion in overruling Gillie's objection to the State's closing argument because it infringed on his Fifth Amendment right not to testify and impermissibly shifted the burden of proof?

3. Did the trial court abuse its discretion in modifying the pattern jury instruction for indecent exposure by adding language defining who qualifies as a "casual observer," taken from *Wisneski*?

4. Is the evidence sufficient to establish indecent exposure, including the element of public exposure to a casual observer, based on Gillie's exposure of himself to the victim in her bedroom?

We conclude that the trial court did not err or abuse its discretion in admitting the security camera video footage, overruling the defense objection during closing argument, and instructing the jury on the elements of indecent exposure. Interpreting the concept of "casual observer" in the context of this common law crime, we hold that the evidence is

sufficient to convict Gillie. Because Gillie does not challenge the sufficiency of the evidence supporting his fourth-degree sexual offense conviction, we will affirm both judgments.

BACKGROUND

The State presented testimony from the victim, J.L., and security camera video from her residence to prove that Gillie, a guest in her home, entered her bedroom when she was alone in bed, then masturbated while "pulling [her] clothes down[.]" The incident occurred on October 17, 2021, after J.L., her husband, and a friend, B., returned to her house following a Halloween party. J.L.'s husband, who had been Gillie's friend for 13 or 14 years, invited Gillie to the party "because it was more girls there than boys." After J.L., her husband, and B. returned to J.L.'s house around 12:30 or 12:45 a.m., Gillie arrived approximately 30 minutes later.

Shortly after Gillie arrived, everyone fell asleep on the sofa. J.L. testified that Gillie woke her around 4:45 a.m., saying "he was going to make sure [she] got upstairs first and then he would come back down and wake [her] husband up to come upstairs." When she went upstairs, Gillie followed behind her, "made sure [she] got in the room" and was "okay," then left. "And then that's when the back and forth started."

J.L. testified that for the next "one and a half to two hours or so[,]" Gillie "was in and out of [her] bedroom[.]" Although J.L. was aware of Gillie coming in "two or three, at most, four" times, her home security camera system recorded video footage of the

upstairs hallway, showing Gillie entering her room "nine or 10 times[.]" Over Gillie's authentication objection, video footage from the camera was admitted into evidence.

According to J.L., she kept telling Gillie "to go and get [her] husband and he ke[pt] telling [her] he's trying to wake him up[,]" but he was "really not" doing so. Instead, he was "just coming back into the bedroom."

During an encounter corresponding to video footage showing Gillie enter her bedroom at 4:54 a.m. and leave at 5:07 a.m., J.L. recounted that Gillie

> told me that he wanted to spurt before he went home, I told him he had a girlfriend at home for that, he said she doesn't please him like he needs to be pleased. He stated that he needs it seven days a week and she's not satisfying him. So I repeated to him that he was not going to do that in my house and once that conversation—we was like smoking a little Hookah back and forth during that conversation and then he left.

At the time, J.L. testified, she misunderstood Gillie, believing that he was expressing an interest in "reliev[ing] himself sexually" with her friend B. "because of past history with him wanting to have sex with my other friend[.]" So after talking to Gillie, J.L. texted B., who was still downstairs on the sofa, telling her "that he likes her."

After other trips back upstairs to J.L.'s bedroom, Gillie returned at 6:44 a.m., as shown on the security camera footage. J.L. testified that when he

> came back in, he called my name, I said yeah, and then during the time, he was masturbating and he wanted me to pinky promise I wouldn't tell anyone, we could keep it between him and I, we could be best friends afterwards. He was pulling my clothes down telling me [he] only needs two minutes. He said that he needs some napkins so that he doesn't make a mess on my sheets.

According to J.L., Gillie "[g]rabbed" the "waistband of [her] pants and [her] underwear." When he succeeded in pulling down her underwear, she "pulled them back

up, he pulled them back down, [she] pulled them back up and [then] got up and . . . left out the room." During this part of the encounter, he "did touch [her] rear end . . . when [her] clothes were down." According to J.L., "[o]nce he pulled my clothes, then we was playing like tug-o-war with my clothes. That's when I got up and I left out the room[.]"

Making Gillie go first because she "wasn't comfortable with him behind" her, J.L. went downstairs. J.L. woke her husband in the living room and proceeded "to bring him upstairs." She turned off the camera system "because of the notifications" on her phone.

When asked why she did not try to wake her husband earlier, J.L. testified, "I knew not to call my husband, my husband was passed out asleep and there was no waking him up for a couple of hours." But once Gillie "did physically touch me, that's when I was like this is too much, I'm going to get up and I'm going to go downstairs, so that's what I did."

Around 7 a.m., J.L. left with B. to go pick up her children from her parents. Although she had told Gillie "that he needed to leave," when she returned around 7:40 a.m., he was still in her house. He followed her around as she walked through her living room and kitchen, telling J.L. that "he still needs just two minutes." J.L. "had to push him out of the actual house."

At 9 a.m., J.L. and her eight-year-old daughter had "non-refundable hair appointments," for which she had already paid "hundreds of dollars[.]" During the hours they were at that appointment, J.L. texted her husband about the incident around 11 a.m., and he encouraged her to call the police. She did so after they "returned back to [her] home" around 7:30 p.m.

Defense counsel challenged J.L.'s credibility, eliciting her testimony that she knew Gillie for more than ten years and that he visited their house more frequently in 2021, but that he never "made any advances" toward her. Gillie did not call any witnesses, but to impeach J.L., he presented text messages and body-worn camera footage showing portions of J.L.'s statement to police. Although J.L. told police she was not drinking, she admitted that when she texted B. at 5:45 a.m. she was very drunk. J.L. nevertheless insisted that "there was no way [she] was drunk" by the time she left the house "an hour and maybe 20 minutes after that picking [her] children up[.]"

On re-direct and re-cross, J.L. clarified the timeline of events in reference to the time-stamped security camera footage showing Gillie coming into her room nine or ten times. J.L. explained that the first time Gillie brought up "squirting" was "[w]hen he came into the room at 5:07[.]" After smoking and having "the conversation about his girlfriend," Gillie left. J.L. "rolled over to go back to sleep[,]" so she did not "know exactly how many times he was in and out of the bedroom" before returning when "the sun was coming up."

Video shows Gillie returned to her room a sixth time around 6:07 a.m. According to J.L., after Gillie told her that he did not "want to mess up [her] sheets[,]" he returned another time after "grabbing a tissue[.]"

J.L. testified that when Gillie returned the final time "well into the 6:00 hour," she was "laying on [her] bed[.]" By the time she realized he was there and "turned around," his penis "was already out." He was "masturbating" with his right hand while "pulling . . . down" her clothes and underwear, and grabbing her "rear end," with his left hand.

Defense counsel sought to impeach J.L. by suggesting she fabricated that accusation because she worried that her husband, whom she feared based on past incidents of violence, would talk to Gillie and find out either that "she was coming onto" Gillie or that "it was consensual." Defense counsel elicited that before marrying her husband, J.L. had twice filed physical assault charges against him; that their marriage was not "perfect"; and that by the time she talked to police that night, she knew Gillie had discussed the incident with her husband before she told him about it. Although J.L. admitted that she waited hours before reporting the incident to her husband and the police, she insisted that when she told her husband, she "had no idea" that Gillie had already discussed the incident with him. Denying that she was concerned about what Gillie would tell her husband, she pointed out that when she left the house to pick up her children that morning, she knew Gillie was still there with him.

Defense counsel moved for a judgment of acquittal on the ground that the "public place" element of indecent exposure does not encompass this situation, "where at some a.m. in the morning, in a bedroom, somebody" exposed himself in circumstances when there was no "likelihood of an observer" "other than just one person." Citing *Wisneski v. State*, 398 Md. 578 (2007), the court disagreed, concluding that "an indecent exposure within a private dwelling may suffice" when it is "seen by one casual observer[.]" The court further distinguished someone pulling "down his or her pants to go use" a bathroom, from "go[ing] into somebody's bedroom" where "someone you know is present" to expose

yourself, emphasizing "that is not done in secret because it's not done privately, it's done in the presence of another casual observer."

Based on these distinctions, the court denied the motion and ruled that it would add to the pattern jury instruction on indecent exposure, using "words taken directly from" *Wisneski*. When defense counsel again objected to characterizing "the witness in this case [as] a casual observer[,]" the court noted that according to *Wisneski*, "a casual observer is in the context of the crime of indecent exposure, one who observes the defendant's acts unexpectedly; one who did not expect, plan or foresee the exposure and who was offended by it." We will later discuss the trial court's supplemented instruction.

In closing, the prosecutor argued that "this case is about a woman's ability to feel comfortable in her own home." J.L.'s account of the incident was consistent with the video evidence showing Gillie going to her bedroom "[n]o less than nine times[,]" going upstairs after "grab[bing] a tissue from the table[,]" and "acknowledging the existence of the cameras" by "giv[ing] the peace sign" and "flip[ping] the camera off." Even though J.L.'s text message to B. contradicted her statement to police that she was not drinking, the prosecutor argued that her detailed testimony "match[ed] up with the sequence of the videos," and "there is no evidence or testimony to give us reason to believe that this wasn't anything but a forceable encounter."

Defense counsel argued that J.L. was trying to convince her husband "that all this was something that she didn't consent to or that she wasn't trying to come on to anybody." Defense counsel posited that J.L. was worried that "something would be said about her

behavior that night" so the next morning "[s]he takes a preemptive strike to tell her husband, . . . [Gillie] was doing this, but I wasn't in on it." Pointing out that Gillie came into J.L.'s bedroom "nine times," defense counsel questioned whether "all [she] said" was "go get my husband[,]" or "was she saying go see if he's still asleep?" Although J.L. "claims she was offended[,]" the evidence showed that "she called police only after her husband told her to do so." According to defense counsel, after telling police about the incident, but lying about not drinking, J.L. "went to the Commissioner" when police declined to charge Gillie, because "[h]er husband said you better go there to prove that you . . . were not part of this, of whatever went on."

In rebuttal, the State argued that the body-worn camera footage indicated that police may have declined to charge Gillie, and instead advised J.L. to go seek charges herself, because, despite J.L. "repeat[ing] her story at least three times in the presence of a crying baby, other children that needed to be tended to," with only the one inconsistency about drinking, "the officer" was not "taking Mrs. [L.] seriously . . . in light of the fact that people were drunk."

We will add material from the record in our discussion of the issues raised by Gillie.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AUTHENTICATED HOME SECURITY CAMERA VIDEO FOOTAGE

Gillie contends that the trial court abused its discretion in admitting security camera video footage from J.L.'s residence because the State failed "to authenticate the video

either under the 'silent witness' theory or the 'pictorial testimony' theory[.]" For reasons that follow, we disagree.

A. Standards Governing Authentication of Security Camera Video Footage

Maryland Rule 5-901 provides in pertinent part:

> **(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> **(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> (1) *Testimony of Witness With Knowledge*. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be. . . .
>
> (4) *Circumstantial Evidence.* Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be. . . .
>
> (9) *Process or System.* Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.

Recently, in *Prince v. State*, 255 Md. App. 640, 651–54 (2022), this Court reviewed the standards and methods for authenticating security camera video footage:

> This Court must determine whether the trial court abused its discretion in finding that the surveillance footage was properly authenticated before admitting it into evidence. *Donati v. State*, 215 Md. App. 686, 708 (2014). A trial court abuses its discretion when "no reasonable person would take the view adopted by the trial court," or when the ruling is "clearly against the logic and effect of facts and inferences before the court." *King v. State*, 407 Md. 682, 697 (2009) (cleaned up).
>
> Under Maryland Rule 5-901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Because photos and videos can be manipulated, "[c]ourts

> . . . require authentication of photographs, movies, or videotapes as a preliminary fact determination . . . ." *Washington* [*v. State*, 406 Md. 642, 651–52 (2008)]. The admissibility requirements for videotapes are the same as the requirements for photographs. *Id*. at 651. Photographs and videotapes may be authenticated either of two ways: through the pictorial testimony theory of authentication or the "silent witness" theory of authentication. On the one hand, "the pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge"; on the other, the "silent witness" theory "authenticates a photograph as a mute or silent independent photographic witness because the photograph speaks with its own probative effect." *Id*. at 652 (cleaned up).

Id. at 651–52 (first three alterations in original).

In that case, the State alleged that Prince, a machine operator at "a company that manufactures and installs countertops[,]" "summoned five co-workers to come closer, then he shot each of them[,]" killing three. *Id*. at 646. The business owner who authenticated security camera footage of the shootings, Mr. Kucuk, testified that the video equipment was controlled from his office with cameras throughout the business property; "that he, his business partner, and a 'technical person in charge of the cameras and making sure they are working and connected' were the 'caretaker[s]' of the video"; and "that the cameras were used on a daily basis." *Id*. at 649–50 (alteration in original). He explained that the "DVR and . . . recorder" "automatically" recorded "all around the building" and that he could access video from his cell phone. *Id*. at 650. On the day of the shooting, he "physically showed" police officers "how to access the video and the past of it." *Id*. He watched the officers while they took a copy and also watched the video itself. *Id*. According to Mr. Kucuk, the portion proffered by the State was one that he viewed and "couldn't be" changed. *Id*. at 650–51.

Acknowledging that video evidence may be authenticated under the silent witness theory by "presentation of evidence describing a process or system that produces an accurate result[,]" we noted that "Maryland courts have not adopted 'any rigid, fixed foundational requirements for admission of evidence under'" this method. *Id*. at 652 (first quoting *Washington*, 406 Md. at 652, then quoting *Jackson v. State*, 460 Md. 107, 117 (2018)). As in this case, the appellant in *Prince* relied on *Washington* to challenge the State's silent witness authentication of the video footage. We explained:

> In *Washington*, the State introduced surveillance footage of a shooting that occurred outside of a bar during the direct examination of the bar's owner, Mr. Kim. The footage was "compiled from the various cameras and was transferred to a VHS tape" by a technician, a process unknown to Mr. Kim. The State relied on the "silent witness" theory of authentication and the trial court admitted the tape into evidence over defense counsel's objection. The Court of Appeals held that there was insufficient foundation as to "the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures." Because the recording was "made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD," the Court held that the foundation was insufficient.

Id. at 653 (citations omitted) (quoting *Washington*, 406 Md. at 646–47, 655).

We distinguished the inadequate silent witness authentication in *Washington* from the State's authentication of video footage showing the workplace shooting in *Prince*. "[A]lthough the system involved 16 cameras" in *Prince*, there was "no evidence that the footage was 'compiled from the various cameras.'" *Id.* at 654 (citing *Washington*, 406 Md. at 646). Instead, "[t]he surveillance footage . . . took the form of a 'simple videotape'

and required a less detailed foundation than the more complicated footage at issue in *Washington*." *Id.*

We concluded that "the State established that Mr. Kucuk was one of the 'caretaker[s]' of the surveillance footage" based on testimony

> that the cameras were used on a daily basis and that they automatically recorded what they captured. He explained that the cameras did not need to be turned on and that they were running constantly; he was able to access the live feed from the cameras on his cellphone but needed to be in his office to access recorded footage. Although Mr. Kucuk did not access and download the recorded footage for the police himself, he knew the process and was able to show the officers how to do it while he was present. Mr. Kucuk also watched the video that the police officers downloaded and was able to identify State's Exhibit No. 1 as the same surveillance footage. Moreover, there was no evidence that the cameras were not working properly or that the video had been altered.

Id. at 653.

Because the caretaker witness "knew the process by which the police could obtain the video" showing "the viewpoint of one camera[,]" *id*. at 654, we concluded that "[t]he State's foundation authenticated the surveillance footage sufficiently before it was admitted," *id*. at 653. "Given that '[t]he threshold of admissibility is . . . slight,' and that the tape did not undergo any editing before being viewed by the police and used during trial," we held "that the State laid a sufficient foundation and that the court did not abuse its discretion in admitting the surveillance tape into evidence." *Id*. at 654 (alterations in original) (citation omitted).

B. The Parties' Contentions

Gillie challenges the trial court's ruling that the State adequately authenticated the security camera footage through J.L.'s testimony, arguing that "J.L. merely testified to the existence of the camera system and the areas it covered." She "did not know the name of the company that provided the cameras[,]" the State did not present a "technician or someone possessing expertise or knowledge of the computerized system and how the data is transferred" so as to evaluate "whether the videotape was edited," and the record does not show which of the clips make up the exhibit that J.L. viewed in court.

The State counters that "J.L.'s testimony constituted sufficient foundational proof to permit a reasonable juror to conclude that the footage was a reliably accurate depiction of the events it purported to portray." In particular, J.L.'s familiarity with the video system was sufficient for her to authenticate it as a "silent witness," and her presence in and personal knowledge of the people and places depicted in the footage allowed her to authenticate it by "pictorial testimony."

C. Analysis

We conclude that the testimony of J.L. authenticated the challenged home security camera video footage under a combination of the silent witness and pictorial testimony methods.

Supplying supporting facts under the silent witness theory, J.L. testified about her home camera system and its "general reliability[,]" including the accuracy of its time and date stamps, the accessibility of the recordings through her cell phone application, and that

the video could not be edited. *See Washington*, 406 Md. at 653. As in *Prince*, J.L. testified as a "caretaker" of the video camera system that she had "security cameras outside and inside" her residence. The inside "security camera monitor[s]" recorded her "living room, dining room and kitchen [and her] stairs going upstairs," and there were also "cameras showing . . .the [upstairs] hallway so that it's showing who's coming down the hallway past [her] kids bedroom and then it shows who's . . . coming towards [her] bedroom." Although she did not know what company made the camera system because her "husband bought the cameras[,]" she and her husband operated and accessed the system through "an app on [their] phone." J.L. explained that the system is not password-protected, but that "all we can do is . . . delete the footage." In addition, footage she had seen from the camera "fairly and accurately depicted the scene as she remember[ed] it," and "as [she] remember[ed] watching it[.]"

J.L.'s testimony about what is shown in the video provided further authentication under the pictorial testimony method. She identified exhibits showing still images and "camera footage from [her] upstairs and downstairs on the night of October 16th through the 17th." In her experience watching videos from her surveillance cameras in the past, their date and time stamps were correct.

When the State then moved the exhibits into evidence, defense counsel objected that "the foundation" was inadequate because even though "she did give a general operation of how to determine what's on the video[,]" J.L. "cannot testify to . . . the operations of the video by herself[.]" We conclude that the trial court did not abuse its discretion in

overruling Gillie's authentication objection and admitting the exhibit into evidence, on the ground that "she has testified to" her "experience with the video" that the date and time stamp "has been accurate" and that "other days when she's viewed it, it has loaned [sic] an accurate depiction of activities in and around her house where the cameras were located and where they can in fact surveil and record things."

Moreover, to the extent Gillie alleges preliminary error in admitting the videos without a sufficient factual predicate for its authentication ruling, any such error was rendered harmless by the subsequent admission of more authenticating evidence. Adding to the predicate for admitting the video footage, J.L. testified without objection that the cameras periodically take "still shots" until they are activated by "[m]otion" to record "active shots." She identified clips from the living room and upstairs hallway cameras, showing her friend B. "going to the bathroom" and "coming back to the sofa," as well as Gillie "coming out of [her] bedroom down the hallway past [her] children's room" while she was alone upstairs. Narrating later video clips, she testified that Gillie then "came downstairs and acted like he was going to wake [her] husband up to come upstairs and then he was talking to" B. Because she "was in and out of sleep[,]" she did not "know he was in and out of the bedroom that many times until [she] watched the camera footage back later on."

J.L. also identified footage of Gillie, at 4:52 a.m., "making his way back to the upstairs steps" while "looking straight at the camera and" making a gesture with "two fingers . . . [l]ike the peace sign" before "going back into [her] bedroom." When Gillie

exited J.L.'s bedroom at 5:07 a.m., they had just talked "about his girlfriend not pleasing him enough and him wanting to squirt before he went home and [J.L.] explained to him that that wasn't going to happen in [her] house." In a later clip, Gillie was "coming back upstairs[,]" making "[a]nother peace sign to the camera as he's making his way back into [J.L.'s] bedroom and then the middle finger, and then back into [her] bedroom." After again leaving her bedroom to go back downstairs, Gillie returned at 6:44 a.m., and started "pulling [her] clothes down[.]" J.L. testified that when she went downstairs to go wake her husband, her phone was "flashing because of the notifications from the camera system," so she "cut the cameras off."

We are not persuaded by Gillie's arguments that this authentication failed to satisfy Rule 5-901 because J.L. did not know the name of the camera system that her husband bought or present a technical witness to explain how the system operated and how the video clips that she recognized were compiled. Those deficits went to the weight of the evidence, not its admissibility. Subsequent to *Washington*, which considered recordings by commercial surveillance cameras in 2005, home security technology advances have featured the advent of video streaming capabilities via smart phones, making residential video camera systems more affordable and accessible, while reducing the need for trained technicians to install, operate, retrieve, and compile images. For a simple consumer-operated streaming residential camera system like the one described by J.L., the threshold for authenticating video recordings requires a less technically detailed foundation than that required to authenticate the complicated commercial property security system in

Washington. *See Prince*, 255 Md. App. at 654; *cf. State v. Galicia*, 479 Md. 341, 393, *cert. denied*, 214 L. Ed. 2d 280 (2022) (noting that "[t]here has been, and will continue to be, much debate over which aspects of this pervasive yet rapidly evolving [smart phone] technology are within the common knowledge," but that experts were not needed to explain the common "understanding that a user may exercise some control over [the location tracking] feature and the data that it generates").

As a caretaker of her home security system, J.L. offered a sufficient foundation regarding the location of the cameras, how they operated, the reliability of the images produced, how the footage could be accessed, and her inability to alter footage. Based on her personal knowledge, she testified about the people, places, and events shown in the video. Because "[t]he threshold of admissibility is . . . slight[,]" and J.L.'s testimony authenticated the video evidence under both the silent witness and pictorial testimony methods, the trial court did not abuse its discretion in ruling that it was for the jury to decide whether the video evidence was what the State purported it to be. *See Jackson*, 460 Md. at 116; Md. Rule 5-901.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING GILLIE'S OBJECTION DURING CLOSING ARGUMENT

Gillie contends that the trial court abused its discretion in overruling the following objection that occurred after the State argued in closing that video footage showed him "on multiple occasions acknowledging the existence of the cameras" by "giv[ing] the peace sign" and then "flip[ping] the camera off":

[PROSECUTOR]:	That's not the behavior of someone who knows what he's doing is benign. That's the behavior of someone who knows that he's doing what he's not supposed to be doing. Now, [defense counsel] would like you to believe that, in fact, it was the victim in this case who initiated, who consented to this. *But you heard from her and there is no other testimony or evidence contradicting that* –
[DEFENSE COUNSEL]:	*Objection.*
THE COURT:	*Overruled.*
[PROSECUTOR]:	-- that the defendant was, at the very least, an active participant in this. In fact, there is no evidence or testimony to give us reason to believe that this wasn't anything but a forceable encounter.

(Emphasis added).

Gillie contends that in the highlighted remark, the prosecutor improperly commented on his "silence and/or his lack of evidence production as an indication of his guilt" in violation of his Fifth Amendment rights. According to Gillie, "Even if the prosecutor's remarks did not impinge on [Gillie's] right to remain silent and to not testify at trial, they constituted an improper shifting of the burden of proof to" him because only "[t]wo people were uniquely positioned to say what happened in J.L.'s bedroom on the night in question[,]" so the jury "would naturally look" to him "for evidence 'contradicting' J.L.'s version of events." "Either way," Gillie argues, "the court erred in overruling the objection[,]" thereby "signal[ing] to the jury that the prosecutor's argument was proper[,]"

even though J.L.'s testimony as to whether she was drunk and her delay in calling the police made her account of the incident equivocal.

The State responds that Gillie waived this challenge because he "objected only to the first of two comments the prosecutor made—and the one to which he did object said something unremarkable." Failing to object to the later comment that there was "no evidence or testimony to give us reason to believe that this wasn't anything but a forceable encounter" precludes Gillie from complaining about either comment on appeal. In any event, the State argues, the prosecutor's "passing remark" was neither improper, nor prejudicial, because "it simply stated that Gillie had not disproved that he was in the bedroom interacting with J.L[,]" which "was never disputed[,]" and "the jury was instructed that the closing arguments of counsel are not evidence."

We conclude that there is no merit to Gillie's challenge.

A. Waiver

"[P]ursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). Likewise, unless counsel obtains a continuing objection, a separate objection must be asserted each time the challenged argument is made. *State v. Robertson*, 463 Md. 342, 366 (2019). However, in rare circumstances, a single objection will suffice to preserve an issue for appellate review. In *Robertson*, the Supreme Court of

Maryland[1] quoted *Johnson v. State*, 325 Md. 511 (1992):

> The objection interrupted the [State] in midsentence, and it was perfectly clear what would follow if the objection were not sustained. We think that the objection went not only to what was said but also to what was obviously to come. By overruling the objection, the judge demonstrated that he was permitting the [State] to continue along the same line. It was apparent that his ruling on further objection would be unfavorable to the defense. Persistent objections would only spotlight for the jury the remarks of the [State]. In the circumstances, the absence of a further objection did not constitute a waiver. *See* Md. Rule 4-323(c).

Robertson, 463 Md. at 366 (quoting *Johnson*, 325 Md. at 514–15).

Here, Gillie objected to the prosecutor's initial remark that there was "no other testimony" to contradict J.L.'s claim that she did not consent to his behavior, but did not object when the prosecutor continued by arguing that "there [was] no evidence or testimony to give us reason to believe that this wasn't anything but a forceable encounter." Although it is a close call, because the second remark was substantively similar to and followed naturally from the first statement, we conclude that defense counsel's failure to object to the later comment did not constitute waiver. *See id*.

B. Constitutional Challenges

Maryland courts "grant attorneys, including prosecutors, a great deal of leeway in making closing arguments. 'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Whack v. State*, 433 Md. 728, 742 (2013) (quoting *Spain v. State*, 386 Md.

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

145, 152 (2005)). Because "regulation of closing arguments falls within the sound discretion of the trial court," *Frazier v. State*, 197 Md. App. 264, 283 (2011), which "is in the best position to determine the propriety of argument in relation to the evidence adduced in the case[,]" *Ingram v. State*, 427 Md. 717, 728 (2012), we will not reverse unless "the prosecutor's comments, standing alone, were improper" and "likely to have improperly influenced the verdict." *Sivells v. State*, 196 Md. App. 254, 271 (2010).

Whether a particular closing argument is improper is a record-based decision that we evaluate "contextually, on a case-by-case basis." *Mitchell v. State*, 408 Md. 368, 381 (2009). At issue here is whether the prosecutor crossed constitutional boundaries by commenting on the lack of evidence presented by the defense, in violation of Gillie's exercise of his Fifth Amendment right to silence, including the right to refrain from testifying, or by improperly inviting the jury to shift the burden of proof to Gillie.

In *Harriston v. State*, 246 Md. App. 367 (2020), this Court examined the propriety of "prosecutorial comments on a lack of evidence supporting the defense," while recognizing "that burden-shifting claims" in such cases "are borne out of the defendant's constitutional right to refrain from testifying." *Id*. at 372. Citing *Molina v. State*, 244 Md. App. 67 (2019), we recognized

> that the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right not to have the prosecutor comment on his decision not to testify. *Id*. (citing *Savage v. State*, 455 Md. 138, 157 (2017)). We also explained how this constitutional right may be implicated by a prosecutor's attacks on a lack of evidence provided by the defense:

> Maryland decisional law has interpreted this prohibition to protect defendants from indirect comments as well as direct ones. Indeed, the Court of Appeals has observed that a prosecutor's comment on a "defendant's failure to produce evidence to refute the State's evidence . . . might well amount to an impermissible reference to the defendant's failure to take the stand." But even if the comment was not "tantamount to one that the defendant failed to take the stand," the Court continued, "it might in some cases be held to constitute an improper shifting of the burden of proof to the defendant."
>
> The State's comment on the defense's failure to produce evidence, however, will not always amount to impermissible burden-shifting. For instance . . . the State may "argue or comment that the unexplained possession of recently stolen goods permits the inference that the possessor was the thief." In fact, the State can even request that the court instruct the jury that such an inference is permissible. This is because a factual inference in the State's favor, left unrebutted by the defense, does not shift to the defendant a burden either of persuasion or of going forward with evidence.
>
> But the State may not exceed the bounds of permissibly commenting on the absence of evidence by commenting, instead, directly on the defendant's failure to testify.

Harriston, 246 Md. App. at 372–73 (alterations in original) (internal citations omitted) (quoting *Molina*, 244 Md. App. at 174–75).

We then compared the "no evidence" arguments challenged in both *Smith v. State*, 367 Md. 348 (2001), and *Molina*, finding those decisions "instructive for distinguishing between permissible and impermissible comments." *Harriston*, 246 Md. App. at 373. In *Smith*, we pointed out,

> the defendant was found in possession of stolen leather goods and did not testify. The prosecutor instructed jurors to ask themselves, "What evidence has been given to us *by the defendant* for having the leather goods? Zero, none." The Court of Appeals held those comments violated the defendant's constitutional right to remain silent, explaining:

> > The prosecutor did not suggest that his comments were directed toward[] the defense's failure to present witnesses or evidence; rather, the prosecutor referred to the failure of the defendant alone to provide an explanation. The prosecutor's comments were therefore susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error.
>
> We compared *Smith*'s facts to the facts before us in *Molina*, where the defendants claimed the prosecutor impermissibly shifted the burden of proof to them and effectively commented on their failure to testify. At issue were the prosecutor's comments in closing:
>
> > We listened to about two hours of Ana Molina's attorney talk to us about facts that are simply not correct. . . . But where in those two hours did you hear anything about where that money went and why that money was spent in [Gustave's] best interests or according to his wishes? When did you hear that? For two hours we listened. When did you hear it? When did you hear that?
>
> In contrast to *Smith*, we found these comments permissible, distinguishing them "as highlighting the lack of any evidence explaining the defendant's possession of recently stolen goods," rather than amounting to comment on the defendant's own failure to testify.

Harriston, 246 Md. App. at 373–75 (alterations in original) (citations omitted) (first quoting *Smith*, 367 Md. at 351–52, 358, then quoting *Molina*, 244 Md. App. at 171–72, 176).

Applying these lessons to the closing argument challenged by Harriston, we concluded that the prosecutor's comments were not improper because they responded to defense counsel's closing argument that the State should have called witnesses to testify about certain cell phone evidence. *See id.* at 378–81. In rebuttal, the prosecutor, although emphasizing that the State retains the burden of proving guilt throughout the trial, had

argued that the defense "had the same phone records" and "chose to put on a case" but "didn't . . . talk about the phone records" that they "had . . . the entire time." *Id*. at 379.

We explained that under *Smith* and relevant "case law,"

> Maryland appellate courts have not been quick to label as burden-shifting prosecutorial closing comments on a shortage of defense evidence. In [*Smith*,] the one instance our search revealed where our courts held the comments impermissible, the prosecutor spoke directly to the *defendant's* failure to provide evidence. We have little trouble concluding the prosecutor's comments here do not fit that category. Unlike *Smith*, the prosecutor did not call out Harriston's failure to provide an explanation for his innocence.

Id. at 379–80. "[V]iew[ing] the prosecutor's comments in the context of the opening the door doctrine, as an express response to defense counsel's closing remarks[,]" we also held that the argument did not improperly shift the burden to Harriston. *Id*. at 380.

Here, as in *Harriston*, we have little trouble concluding that the challenged argument was neither impermissible commentary on Gillie's failure to testify, nor improper "burden-shifting." Unlike the "no evidence" argument disapproved in *Smith*, the prosecutor did not invoke Gillie's name or status as defendant. Instead, when considered in the context of the full trial record, the prosecutor's argument fairly responded to defense counsel's suggestions from the outset of the trial that J.L. initiated or consented to Gillie's exposure.

During his opening statement and again during cross-examination of J.L., defense counsel maintained that the evidence would show that J.L. falsely accused Gillie in order to cover up that she either initiated or consented to the encounter. In opening, defense counsel told the jury that

> the evidence will show that my client did not at any time do what is alleged in this case, or what was alleged in this case. To the contrary, I think [(inaudible)] because everyone was drinking, [J.L.] may have done things she wasn't supposed to do, afraid that . . . her husband may find out what happened and she makes up a story and they called police to their house to report this offense, the alleged acts that she claims. But guess what? Police arrive, talk to [J.L.] for at least one hour, 15 minutes or more. You know what they did? They said well, don't follow [sic] with this charge, we're not pressing this charge, we don't see much to it. . . .
>
> So [J.L.] through this letter on the 19th, goes to the Commissioner['s] office and takes out the charge[.]

During cross-examination of J.L., defense counsel focused on J.L.'s false statement to police that she had not been drinking at the Halloween party, which was contradicted by her text message to B. at 5:45 a.m. that stated she was very drunk. Defense counsel then elicited that while J.L. continued to text with B., none of her messages "mentioned anything about what [she] claimed [Gillie] was doing[.]"

When considered in this context, the State's closing argument preemptively addressed Gillie's defense that J.L. falsely accused him to cover for a consensual encounter that occurred while both she and Gillie were intoxicated. Invoking defense counsel's suggestion "that, in fact, it was the victim in this case who initiated, who consented to this[,]" the prosecutor argued that "there is no other testimony or evidence contradicting" J.L.'s testimony "that the defendant was, at the very least, an active participant in this" encounter.

We do not understand this comment to be improperly pointing to Gillie's failure to testify or suggesting that the defense was obligated to produce certain evidence. Instead, the prosecutor emphasized the shortcomings in Gillie's proffered defense that J.L. initiated

or consented to the encounter, by arguing that J.L.'s account of the incident was consistent with the video evidence and uncontradicted by any other evidence. Here, as in *Harriston*, "pointing out such a shortcoming was the 'purpose of jury argument.'" *Harriston*, 246 Md. App. at 376 (quoting *Burks v. State*, 96 Md. App. 173, 205 (1993)).

C. Conclusion

Because Gillie's challenge to the prosecutor's "no evidence" closing argument is without merit, the trial court did not abuse its discretion in overruling defense counsel's objection.

III. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUPPLEMENTING THE PATTERN JURY INSTRUCTION FOR INDECENT EXPOSURE

Gillie next contends that the trial court, over defense objection, erred in instructing the jury on the crime of indecent exposure by supplementing the definition of "public place" to include the case law definition of "casual observer." We again disagree and explain.

A. Standards Governing Review of Jury Instructions

The Supreme Court recently summarized the standards governing appellate review of jury instructions:

> We review the decision of the circuit court to give a jury instruction for abuse of discretion. Pursuant to Md. Rule 4-325(c), a circuit court must give a requested jury instruction when "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given."
>
> "A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." Sufficiency of evidence is a

> question of law for the circuit court, and on appellate review, this Court must independently determine whether the requesting party (*i.e.*, the State in this case) "produced [the] minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." The requesting party must only produce "some evidence" to support the requested instruction, and this Court views the facts in the light most favorable to the requesting party.

Rainey v. State, 480 Md. 230, 255 (2022) (citations omitted).

Maryland's current pattern jury instruction on indecent exposure outlines the three elements of the offense:

> The defendant is charged with the crime of indecent exposure. In order to convict the defendant of indecent exposure, the State must prove:
>
> (1) that the defendant expose a private part of [his] [her] body;
>
> (2) that the defendant did so in a public place; and
>
> (3) that the defendant did so intentionally.
>
> A public place is one where a member of the public could be present or where the defendant knew or reasonably should have known that [he] [she] could be observed by a member of the public. It is not necessary that any specific member of the public actually observe the defendant or that the defendant intend a member of the public to see [him] [her].

Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:18.7.

The explanatory comments to the pattern instruction summarize key precedent:

> It is well established that "public" is anywhere that a reasonable person "knows or should know that his [or her] act will be open to the observation of others." *Wisneski*, [398 Md. at 593]. This means that indecent exposure can occur in private residences. *Indeed, the Wisneski court upheld the conviction of a man who had exposed his genitalia in a private residence*. *Wisneski*, [398 Md. at 604] (emphasizing that "our definition of the 'public'

> element of the offense [], the determining factor is not the actual locale of the conduct, but the circumstances of the viewing."). . . .
>
> Indecent exposure is a general-intent crime. *Ricketts* [*v. State*, 291 Md. 701, 713 (1981)]. It is therefore not required that the defendant specifically intend public exposure.

MPJI-Cr 4:18.7, Comment (emphasis added).

B. The Parties' Contentions

At the State's request, the trial court added the following language to the pattern instruction, explaining that it is taken directly from *Wisneski*, and that the pattern instruction is "incomplete as to the facts of this case":

> A public place can include a private residence where the act was observed by a, quote, casual observer. A casual observer is one who observed the act and did not expect, plan or foresee the exposure and who was offended by it.

Gillie does not dispute that the language added to the pattern instruction is a correct statement of the law, or that the State requested that supplement. Instead, he contends that the need for this addition was not generated by the evidence and arguments presented to the jury because "*Wisneski* arises from a distinguishable set of facts" and because "[i]n the fifteen years since" that decision, "the 'group of distinguished judges and lawyers' who draft the pattern instructions have not seen fit to add the nebulous *Wisneski* language to the pattern instruction."

The State responds that "[i]t was within the trial court's discretion to supplement the pattern instruction" because Gillie's claim that J.L. was not a "casual observer" raised a factual dispute that warranted an instruction predicated on that portion of the holding in *Wisneski*.

C. Analysis

We conclude that the trial court did not abuse its discretion in supplementing the pattern instruction with the "casual observer" language taken from *Wisneski*. As the comments to the pattern instruction establish, Maryland law on indecent exposure is predicated on case law, including *Wisneski*. When the trial court directed the jury that "[a] public place can include a private residence where the act was observed by a . . . casual observer . . . who . . . did not expect, plan or foresee the exposure and who was offended by it[,]" that was a correct statement of the common law, taken directly from *Wisneski*, which is identified in the current comments to the pattern instruction as the seminal Maryland decision holding that an indecent exposure conviction may be predicated on acts performed within a private residence, when the defendant intentionally performs such acts in the presence of a "casual observer."

Because Gillie expressly challenged J.L.'s status as a "casual observer," the State requested the instruction. The current pattern instruction does not include this context-specific concept, but the comments affirm its continuing vitality. Consequently, the trial court did not abuse its discretion in modifying the pattern instruction to include the defining language from *Wisneski*.

IV. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE INDECENT EXPOSURE CONVICTION

Gillie challenges the sufficiency of the evidence supporting his conviction for indecent exposure, arguing that the evidence does not establish a "public" exposure to a "casual observer" given that J.L. "had more than a superficial relationship with" him, the

act occurred in a bedroom in front of one person, and J.L. could not have observed his "putative act of masturbation . . . unexpectedly" given their prior conversation about it.

We are not persuaded by Gillie's sufficiency challenges. Applying lessons from *Wisneski* and other persuasive cases, we conclude that the evidence supports Gillie's conviction.

A. Standards Governing Sufficiency Challenge to Conviction for Indecent Exposure Inside a Private Residence

To evaluate whether evidence is sufficient to support a particular conviction, we view the trial record

> in the light most favorable to the State and assess whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Our role is not to review the record in a manner that would constitute a figurative retrial of the case. This results from the unique position of the fact-finder to view firsthand the evidence, hear the witnesses, and assess credibility. As such, "we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." Our deference to reasonable inferences drawn by the fact-finder means we resolve conflicting possible inferences in the State's favor, because "[w]e do not second-guess the jury's determination where there are competing rational inferences available."

State v. Krikstan, __ Md. __, No. 18, Sept. Term, 2022, 2023 WL 2234210, at *9 (Feb. 27, 2023) (alteration in original) (citations omitted).

In *Wisneski*, 398 Md. at 580, the Supreme Court addressed sufficiency challenges to an indecent exposure conviction that, like this case, was predicated on the defendant's deliberate acts inside a residence where he was a guest, when Wisneski "suddenly exposed his genitalia to three other people in the room, who were not family members and who

were deeply offended by that conduct." In a subsequent decision, this Court summarized that scenario as follows:

> Eugene Wisneski was a visitor in the home of Bridgette Penfield, along with Brandon James. All three were talking, and Wisneski and Penfield were drinking beer. Brandon James left approximately two hours later, and then, after another five hours, James returned to Penfield's home accompanied by his 15-year-old sister, Jennifer James. After about 20 minutes, "Wisneski asked Jennifer if she 'was on her period,' stood up, and exposed his penis and testicles to her, shaking them and repeating the question of whether 'she was on her period.'" Jennifer immediately turned her head away while Wisneski, after clothing himself, continued to grab his genitals outside his shorts and shake them in Jennifer's direction. After Jennifer's brother, Brandon, became enraged and challenged Wisneski to fight, Wisneski abruptly left Penfield's home. Wisneski was arrested and charged with indecent exposure.

Genies v. State, 196 Md. App. 590, 612 (2010), *aff'd*, 426 Md. 148 (2012) (citations omitted).

When Wisneski went to trial, Penfield was not available to testify. *Wisneski*, 398 Md. at 581 n.4. Both Brandon and Jennifer testified that they lived next door to Penfield, visited her home frequently, and were the only other guests at the time Wisneski exposed himself. *Id*. at 582–84.

On appeal, the primary issue was whether Wisneski's exposure occurred in a "public place" within the purview of the common law offense, given that it took place in a private residence. *Id.* 588. The Supreme Court rejected Wisneski's contention that "his exposure to casual observers in a private home does not suffice to constitute the offense[,]" *id*. at 580, holding instead that "lewd conduct that occurred inside a private dwelling" may be

sufficient to convict "even when it is not visible from the exterior of the home." *Id*. at 597, 599, 601.

Reviewing the nature and elements of the crime, the *Wisneski* Court "explore[d] English common law extant in 1776" and our "limited" Maryland precedent. *Id*. at 589–93, 602; *see Messina v. State*, 212 Md. 602, 606 (1957); *Neal v. State*, 45 Md. App. 549 (1980); *Dill v. State*, 24 Md. App. 695 (1975). Citing *Messina*, where the defendant exposed himself to passing teenage pedestrians while sitting in a parked vehicle, Wisneski argued the evidence was not sufficient to convict him because "an indecent exposure[] occurs in a 'public place' if . . . it is 'likely to be seen by a number of casual observers'" who "may have been passing by the outside of [the host's] home, and not those inside the home as invited guests." *Wisneski*, 398 Md. at 587 (quoting *Messina*, 212 Md. at 605–06).

The State countered "that indecent exposure can occur within the confines of a private building even without evidence indicating that an exposure could be viewed from outside the building," because "under *Messina*, an exposure occurs in a public place if it is visible to 'casual observers' because, under the circumstances, it could 'be seen by a number of persons, if they were present and happened to look.'" *Id*. at 587–88 (quoting *Messina*, 212 Md. at 605–06).

Pertinent to this appeal, the Court recognized that each of the three elements of the common law crime has some "public" component. In addition to the "public exposure" element, the intent element also "is infused with" a public component "in the distinction between accidental and wilfulness," *id.* at 593, and "[a] 'public' aspect . . . infuses the

element of observation" in the sense that "the defendant must have 'published' his indecent exposure at such a time and place that anyone who happened to have been nearby could have seen it, had he looked," *id*. at 595 (citing *Messina*, 212 Md. at 606). Acknowledging that there was no Maryland precedent for "lewd conduct that occurred inside a private dwelling," *id*. at 597, the Court determined that "[w]hen confronted with the same issue of whether to criminalize an indecent exposure in a private dwelling, courts of our sister states have divided." *Id.* at 597–98.

After reviewing representative cases, the Court was

> persuaded by the logic of the majority of the courts in our sister states that an indecent exposure within a private dwelling may suffice. As explored in *Messina*, the issue is primarily one of whether the defendant's behavior was done in secret or in a place observed or capable of being observed: "[t]he place where the offense is committed is a public one if the exposure be such that it is likely to be seen by a number of casual observers."

Id. at 601 (alteration in original) (quoting *Messina*, 212 Md. at 605).

In support of this public exposure/casual observer construction of our common law, the Court cited persuasive precedent involving defendants who exposed themselves in a variety of private residential settings. *Id*. at 599–601. These include exposures "to a woman in her apartment," *id.* at 599 (citing *McGee v. Georgia*, 299 S.E.2d 573 (Ga. Ct. App. 1983));[2] to the defendant's "babysitter and the babysitter's two younger siblings and

[2] In *McGee*, as in this case, the defendant masturbated in front of the victim after she invited him into her home and indicated that she would not consent.

> When the victim returned to her apartment from class the following day, defendant was waiting outside. He gave a reasonable explanation for
>
> (continued)

a friend in his own home[,]" *id.* at 600 (citing *Greene v. Georgia*, 381 S.E.2d 310 (Ga. Ct. App. 1989));[3] and to the defendant's "*own two daughters*, as well as two other undisclosed

> being there and she invited him in. They initially talked about modeling and defendant asked her to pose for him, to show him her bare midriff and to show him her bra and breasts. She declined the latter. Defendant interjected personal topics into the conversation several times, one being his fantasy to masturbate in front of women. Each time the victim sought to steer the conversation back to more appropriate topics. During the conversation defendant told the victim he could arrange for her to make some money performing "sexual acts" and he tried to persuade her to accept the offer. She declined.
>
> Defendant again raised the subject of masturbation, this time telling her he wanted to do it in front of her. She told him to leave the apartment. He then became agitated and insistent and she became apprehensive that he would harm her if she did not acquiesce. She then told him to do what he needed to do and get out. Defendant then exposed himself, masturbated in front of her and left when he had finished.

McGee, 381 S.E.2d at 574–75.

[3] In *Greene*, the defendant exposed himself at various locations in his own home, to "sixteen-year-old Valerie, her thirteen-year-old friend, Cynthia, and Valerie's young brother and sister" after bringing them "to his home ostensibly to babysit" while his

> wife and children were not home. Greene told the girls that his family probably had gone grocery shopping. A note on the table indicated that Greene's wife had gone to her mother's house and would be back soon. Greene went to shower in the bathroom off his bedroom.
>
> Valerie wanted to use a telephone and looked in the kitchen, where she had seen one previously. She did not find it and told Greene before he got in the shower that she needed a phone. Greene told Valerie that she could use the one in his bedroom.
>
> Valerie made the call and Cynthia went to check on her. Greene, nude, went to the bathroom door and asked Cynthia to bring some razor blades. When she did, he walked out for them. He was still nude and made no attempt to cover himself. He then asked Valerie to bring some iced tea,

(continued)

females, in different locations throughout his home," *id.* at 600–01 (citing *Arizona v. Whitaker*, 793 P.2d 116 (Ariz. 1990)).[4]

> and when she did he again appeared nude. The girls went into the living room and then checked on the young children. Greene asked the girls to make telephone calls to determine whether his wife and children were on the way home. They waited for Greene to go back into the bathroom and then went into the bedroom and sat on the bed to phone. While they called, Greene came out of the bathroom numerous times and walked around nude in front of them. Still nude, he also laid down on the bed behind the girls. The girls were unable to reach anyone at the telephone numbers given by Greene.
>
> About an hour and a half later, the teenagers told Greene that the small children were tired and wanted to go home. Greene told them they could clean up his son's room if they wanted to and they could make up his (Greene's) bed so that he could pay them for something. Valerie was in Greene's bedroom helping to make the bed when Greene again walked out of the bathroom completely unclothed.
>
> In these circumstances Greene's bedroom and bath fit within the meaning of "public place" as defined by OCGA § 16-1-3(15), so as to authorize his conviction for public indecency.

Greene, 381 S.E.2d at 311. The court rejected Greene's argument "that the marital bedroom has been held to be a 'sacred precinct' of privacy by the United States Supreme Court and protectable as such." *Id*.

[4] In *Whitaker*, 793 P.2d at 117 ,

> The indictments allege that incidents occurred in various places, including the defendant's bedroom, living room, in front of the living room window, and in the front and back yards. The allegations in the record are that defendant knowingly masturbated and exposed himself in front of his two daughters, who were under age 15, and two other females whose relationship to the defendant is unspecified. Prior to trial, the defendant moved to dismiss the charges which related to the incidents in the living room of his home. He argued that a person's private home was not a "public place," and alternatively, if it were, the public sexual indecency statute was

(continued)

In these persuasive cases, our sister courts were construing statutory offenses. The Georgia statute defined "public place" as "any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household." *Wisneski*, 398 Md. at 599 (quoting *McGee*, 299 S.E.2d at 575). The Court in *Wisneski*, quoting the Georgia court, pointed out that

> Greene by his own behavior removed the barrier and converted his bedroom and bath from a private zone to a public place, where his nudity might reasonably be expected to be viewed by people other than members of his family or household. It is not necessary that the place be visible to members of the public who are outside of it.

Id. at 600 (quoting *Greene*, 381 S.E.2d at 311).

Similarly, the Arizona statute construed in *Whitaker* criminalizes specified acts, including exposing genitalia, when "intentionally or knowingly" performed while "another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act." *Id.* (quoting *Whitaker*, 793 P.2d at 117 n.1). The "public place" element of Arizona common law was "dropped" in 1978, so "that it is not so much the place as the purpose of the exposure and the likelihood of affront that determine criminality." *Whitaker*, 793 P.2d at 118 (quoting R. Gerber, *Criminal Law of Arizona* 197 (1978)).

Despite those distinctions between statutory and common law offenses, the Court in *Wisneski* adopted the majority view by interpreting our common law offense to

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> unconstitutional as vague and ambiguous because it regulated protected activity.

criminalize "an indecent exposure within a private dwelling[,]" subject to the following proviso predicated on the "casual observer" concept explained in *Messina*:

> The Court of Special Appeals determined in the instant case that Wisneski had "publicly" exposed himself and recognized that the public exposure element can be satisfied in places other than those physically located outdoors or open to the public at large. The intermediate appellate court relied upon factors such as whether the observers in the case were members of Wisneski's household or family, or whether they had consented to the exposure, as have some of our sister states, especially Georgia.
>
> Our jurisprudence, however, in *Messina* defines an exposure as public if "the act . . . is seen or likely to be seen by *casual* observers." *Messina*, 212 Md. at 605. Casual is defined as "not expected, foreseen, or planned." Black's Law Dictionary 231 (8th ed. 2004). It is something that occurs without regularity. Merriam-Webster's Collegiate Dictionary 193 (11th ed. 2003). With respect to a person, it is an individual who, at best, is known only superficially. *Id*. Casual observer in the context of the crime of indecent exposure, then, is one who observes the defendant's acts unexpectedly. Clearly, the circumstances of any case dictate whether the indecent exposure was something to be expected, foreseen, or planned: persons frequenting places of licit public nudity may expect to see naked bodies, while individuals visiting a private home may not, for example.
>
> Therefore, we believe that under a reasoned approach, and based upon our jurisprudence, as limited as it may be, the common law offense of indecent exposure requires wilfulness and observation by one or more casual observers who did not expect, plan or foresee the exposure and who were offended by it. This definition of "public" not only incorporates and reflects the historical antecedents from England for criminalizing the offense, as enunciated by Sir William Blackstone, to prohibit unexpected offensive conduct, but it also compliments the "public" nature of all of the elements of indecent exposure.

Wisneski, 398 Md. at 601–02.

Applying that standard, the Court held

> that the evidence was sufficient in the case *sub judice* for the trier of fact to find, beyond a reasonable doubt, that Wisneski's conduct satisfied all three elements of the offense of indecent exposure. Testimony at trial established that he was standing in proximity to three persons at the time that he exposed

> himself, and that he repeatedly shook his genitalia at one of them, while adamantly and repeatedly asking her if she was "on her period." Wisneski's indecent exposure was wilful and deliberate and subject to actual observation by two of the people, one who became enraged while the other turned away. Both reactions reflect that the two of them were casual observers to Wisneski's exhibition and were offended by it, thereby establishing that Wisneski "publicly" indecently exposed himself.

Id. at 604.

B. The Parties' Contentions

Gillie argues that the evidence regarding the incident in J.L.'s bedroom was not sufficient to convict him because J.L. "was not a 'casual observer' for purposes of indecent exposure." Gillie notes that J.L. "had more than a superficial relationship with" Gillie through her husband, who knew Gillie "for at least thirteen years[,]" invited him to the house, and allowed him to stay the night. "Leaving no doubt" about their acquaintance, Gillie points out that J.L. "accepted [him] into her bedroom, alone, in the middle of the night, and smoked 'hookah' with him." Moreover, his "putative act of masturbation could not have been observed unexpectedly by J.L." after he "made it clear to [her] that he wished to" do so more than an hour earlier. Likewise, Gillie argues, J.L.'s delay in calling the police, "after prompting by her husband and after spending all day getting her hair done[,]" further distinguishes this case from the offensive exposure scenarios considered in *Wisneski*, 398 Md. at 604.

The State responds that Gillie "misinterprets *Wisneski* and ignores" the Supreme Court's interpretation of the common law crime "to permit a conviction based on exactly the sort of factual scenario" presented in this case. In particular, it was not necessary to

establish that the exposure occurred in a location open to the public or in front of more than one person. And "[t]here was no question" regarding the "wilful and intentional element" because Gillie "taunted the cameras outside the bedroom" and was "masturbating as he tried to pull" down J.L.'s clothes.

Here, the State maintains, the evidence was sufficient to support the "public element" because the exposure occurred "at such a time and place that anyone" who was in that bedroom would have seen it. *See Wisneski*, 398 Md. at 595 (citing *Messina*, 212 Md. at 606). Likewise, with respect to the element of "observation by one or more casual observers[,]" the State maintains that "J.L. fell within the definition . . . for purposes of this offense" because "Gillie's decision to go into the bedroom, where he knew J.L. to be, caused that area *not* to be private" in that "it surely was his expectation that J.L. would be there, such that his conduct constituted 'publishing' the offense." As in *Wisneski*, neither the fact that J.L. knew Gillie, nor that they interacted "at a different, platonic level shortly before" can "justify Gillie's suddenly exposing himself." Nor did Gillie previously telling J.L. that he wished to masturbate preclude the jury from finding that his exposure was unexpected and unwanted.

C. Analysis

Gillie does not dispute that the evidence established that he acted wilfully and intentionally in exposing his penis to J.L. Applying lessons from *Wisneski*, we hold that the evidence also is sufficient to establish that he publicly exposed himself to a casual observer. Specifically, we conclude that the "public place/casual observer" element was

satisfied by evidence that when Gillie entered J.L.'s bedroom, he intentionally exposed himself to someone "who observe[d] the defendant's act unexpectedly" and "was offended by it." *See Wisneski*, 398 Md. at 604.

As in *Wisneski*, *McGee*, *Greene*, and *Whitaker*, where the defendants also targeted victims they knew, the evidence that J.L. was an acquaintance—or even a friend—did not preclude her from being a "casual observer" within the specialized meaning that term carries in the context of this common law offense. *See id*. at 601–02. We also reject Gillie's argument that J.L. was not a casual observer because she invited him into her residence and later allowed him to visit her bedroom. As in *Wisneski* and *McGee*, Gillie suddenly exposed himself to his host while he was a guest in her home.[5]

Wisneski is not helpful in addressing Gillie's contention that even if J.L.'s house may be a public place within the purview of the crime of indecent exposure, her bedroom was not, particularly after she permitted him to be there, because the exposure in *Wisneski* occurred in an area of Penfield's home that was occupied by Penfield and her three guests. Instead, we look to the cases the *Wisneski* Court relied on as persuasive precedent for

[5] The Court in *Wisneski* was not asked to decide whether Penfield, the host who had invited *Wisneski* into her house, was a "casual observer" for purposes of that sufficiency challenge, because she was unavailable to testify. *Wisneski*, 398 Md. at 581 n.4. Yet the Court did point out that Wisneski exposed himself while "standing in proximity to three persons at the time," then characterized Penfield's two guests who frequently visited Penfield's house as casual observers who did not expect, plan or foresee Wisneski's exposure, and were offended by it. *Id.*, 398 Md. at 583, 602, 604. We discern nothing in the Court's decision or rationale to warrant distinguishing Wisneski's exposure to his host, Penfield, from his simultaneous exposure to fellow guests, Brandon and Jennifer.

guidance on how broadly we may construe the principle that a public exposure may occur inside a private dwelling.

In *Wisneski*, the Court characterized the Georgia "holdings in *McGee* and *Greene*" as

> akin to our definition of the 'public' element of the offense of indecent exposure in that the determining factor is not the actual locale of the conduct, but rather the circumstances of the observation, as iterated in *Messina*'s definition of 'public' as anywhere that a reasonable man knows or should know that his act will be open to the observation of others.

Id. at 604. In *McGee*, the Court pointed out, "the victim's apartment constituted a 'public place' when the defendant exposed himself therein, knowing that his conduct would be observed by an individual who was not a member of his family or household." *Id*. at 599. In *Greene*, the host's own bedroom was a public place where he exposed himself to his invited guests. *Id*. at 600. The Court in *Wisneski* approved the Georgia court's determination that such "behavior removed the barrier and converted" that space "from a private zone to a public place, where his nudity might reasonably be expected to be viewed by people" he had invited into his home. *See id.* (quoting *Greene*, 381 S.E.2d at 311).

Here, as in *Greene*, the evidence was sufficient for the jury to find that Gillie treated J.L.'s bedroom as a public place, rather than a private zone. He entered nine or ten times for the purpose of visiting J.L., talking and even smoking "hookah" with her. When he returned at 6:44 a.m., began masturbating, and attempting to disrobe J.L., he intended her to see him. In these circumstances, the evidence is sufficient to establish that J.L. was a

"casual observer" because she did not expect to see him masturbating in her bedroom and was offended by it.[6]

We reject Gillie's audacious suggestion that J.L. could not have been a casual observer because Gillie warned her that he wished to masturbate. The untenable premise underlying that argument is that merely announcing one's desire to masturbate, to someone who has not consented, makes that ensuing conduct expected and/or acceptable. As in *McGee*, such an indecent proposition cannot justify the indecent exposure. *McGee*, 299 S.E.2d at 575 (affirming conviction based on evidence that after victim invited McGee into her residence, he expressed interest in masturbating, then did so over victim's objection).

For these reasons, we are not persuaded by Gillie's contentions that J.L. could not have been a "casual observer" to a "public exposure" because the evidence established that she knew him, that he was a guest in her home, that she previously allowed him into her

[6] In our view, Gillie's narrow construction of "public exposure" to a "casual observer" is consistent with the dissenting opinion in *Wisneski*. Judge Greene, joined by Chief Judge Bell, objected to construing the concept of "casual observer" to encompass "an individual with whom a person has spent an afternoon inside a private dwelling who then happens to act in an unexpected manner." *Wisneski*, 398 Md. at 607 (Greene, J., dissenting). In the dissenters' view, "a casual observer is an individual who happens upon a defendant in the midst of his or her indecent exposure such that the confrontation with that individual is 'not expected, foreseen, or planned,' like the situation involving the teenager who happened to walk by Messina while he was exposing himself in his car." *Id*. at 606–07. Applying that narrower construction, the dissenters would have held that "the other individuals who were present when Wisneski exposed his private parts were not casual observers and Wisneski's exposure inside the private dwelling did not convert the private home into a public place." *Id*. at 607.

To the extent Gillie seeks reversal of the majority holding in *Wisneski*, his recourse is to the Supreme Court of Maryland.

bedroom, and that she knew he wanted "to squirt." In our view, Gillie's narrow interpretation of who may be a casual observer to a public exposure reflects a misplaced focus on "casual" rather than "observer." As in *Wisneski* and the persuasive cases it follows, it is not necessary for a casual observer to be a stranger or to be random rather than targeted. Nor is it necessary for the observation inside the residence to occur in a location that is typically open to visitors. *See Greene*, 381 S.E.2d at 311 (exposure occurred in defendant's bedroom and bathroom); *Whitaker*, 793 P.2d at 117 (exposure occurred in various places in and around defendant's house, including inside defendant's bedroom).

Instead, applying lessons from *Wisneski*, we understand the critical component to the public exposure/casual observer element to be that the exposure occurs at a place and time that the victim does not expect or condone. *See id.* at 601 ("Casual observer in the context of the crime of indecent exposure . . . is one who observes the defendant's acts unexpectedly."); *id.* at 602 ("[U]nder a reasoned approach, and based upon our jurisprudence, . . . the common law offense of indecent exposure requires wilfulness and observation by one or more casual observers who did not expect, plan or foresee the exposure and who were offended by it."). In accordance with *Wisneski* and its rationale, the crux of this element is that the victim does not expect the exposure at the place and time it occurs because she has not consented to it. Under *Wisneski*, such evidence that an exposure was "unexpected" and "offensive" may be sufficient to establish that it was "published" to a "casual observer." *See id.* at 595, 602.

Applying these principles and precedents to the record before us, we hold the evidence was sufficient for the jury to convict Gillie of indecent exposure. The jury determined that J.L.'s testimony, corroborated by the security camera footage, established that Gillie, while a guest in J.L.'s residence, repeatedly entered her bedroom, then masturbated next to J.L. while attempting to remove her clothes. That indecent exposure inside her bedroom, where and when he knew she would see him, was wilful and actually observed by J.L., who objected and fled. As in *Wisneski*, that evidence established that she was a "casual observer" who did not expect Gillie's public exposure and was offended by it. *See Wisneski*, 398 Md. at 604 (The witnesses' "reactions reflect that the two of them were casual observers to Wisneski's exhibition and were offended by it, thereby establishing that Wisneski 'publicly' indecently exposed himself.").

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.