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IN THE
COURT OF APPEALS OF INDIANA

MARK LAMONTE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0812-CR-693
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
Cause No. 49F10-0806-CM-157489

July 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Mark Lamonte appeals his conviction of public nudity as a Class C misdemeanor.[1] Concluding there is sufficient evidence to support his conviction, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 28, 2008, Indianapolis Metropolitan Police Officer Michael McClain, who was in plain clothes and working the panhandling detail, "observed [Lamonte] walk into an alley in the one hundred (100) block of South Meridian Street, unzip his pants, and urinate" while Lamonte was "standing behind a parked car off to the south side of the alley." (Tr. at 6.) Officer McClain walked up beside Lamonte and "saw him urinating and put his penis back into his pants." (*Id.*) Lamonte turned and made eye contact with Officer McClain, who then identified himself as a police officer.

The State charged Lamonte with Class C misdemeanor public nudity. Following a bench trial, the trial court found Lamonte guilty as charged. The trial court sentenced Lamonte to sixty days with fifty-six days suspended.

DISCUSSION AND DECISION

Lamonte's sole argument on appeal is that the State's evidence was insufficient to support his public nudity conviction. Our Supreme Court has summarized the standard of review when assessing claims of insufficient evidence as follows:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence

[1] Ind. Code § 35-45-4-1.5(b).

> to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

To prove Lamonte committed Class C misdemeanor public nudity, the State was required to prove that Lamonte, knowingly or intentionally appeared in a public place in a state of nudity. *See* Ind. Code § 35-45-4-1.5(b).

Lamonte first argues the evidence was insufficient to prove he was in a public place. Although the term "public place" is not defined by statute, we have held that for the purpose of Indiana Code § 35-45-4-1, "a public place is any place where members of the public are free to go without restraint." *Long v. State*, 666 N.E.2d 1258, 1261 (Ind. Ct. App. 1996). *See also Whatley v. State*, 708 N.E.2d 66, 68 (Ind. Ct. App. 1999) (explaining "there is no significant difference between what constitutes a public place in the context of the public indecency statute and what constitutes a public place in the context of the public intoxication statute"); *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 583 (1979) (interpreting "public place" under Indiana's previous public indecency provisions). As this Court recently explained in *Christian v. State*, 897 N.E.2d 503, 504-05 (Ind. Ct. App. 2008), *trans. denied*:

> A public place does not mean only a place devoted to the use of the public. It also means a place that is in point of fact public, as distinguished from private,--a place that is visited by many persons, and usually accessible to the neighboring public. A private residence, including the grounds surrounding it, is not a public place.

(Citations and internal quotations omitted).

Lamonte contends his conviction should be reversed based on *Christian*. This Court reversed Christian's conviction for public intoxication, concluding that the State failed to prove she was located in a public place because she was in a driveway or parking area between two residences that was perpendicular to a public street, and the State did not present evidence that the parking area was used by the public in general and not just the residences. *Id.* at 505.

Here, unlike *Christian*, the area where the offense occurred was not residential. Officer McClain testified Lamonte went into an alley in the 100 block of South Meridian Street in downtown Indianapolis and that cars were able to access the alley and park there. Lamonte introduced a photograph of the alley into evidence, and it shows the alley was located between Krieg Bros. Religious Supplies and a building that appeared to be for lease. During Lamonte's testimony, he attempted to characterize the area where Officer McClain found him urinating as a "vestibule" or "gangway" and not an alley. (Tr. at 11.) Lamonte acknowledged that cars could park in the area and claimed that the alley was used as parking for the people who live in a nearby building.

Lamonte contends that although Officer McClain testified the offense occurred in an alley, Lamonte's own testimony shows the area involved was not public because he

testified the area was a "vestibule or gangway between an alley" used as a parking lot by the people who live there. (*See* Appellant's Br. at 4.) Lamonte invites us to reweigh the credibility of the witnesses and their testimony, which we will not do. *See Drane*, 867 N.E.2d at 146. The evidence supports the conclusion Lamonte was in a public place. *See, e.g.*, *State v. Jenkins*, 898 N.E.2d 484, 488 (Ind. Ct. App. 2008) (holding an outside, unenclosed courtyard area of an apartment complex where public had access was a public place under public intoxication statute), *trans. denied*.

Lamonte also argues the evidence is insufficient to show he was in a state of nudity. Nudity "means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind. Code § 35-45-4-1(d).

Lamonte acknowledges he went into the alley and urinated but contends "[t]he evidence does not support a conclusion beyond a reasonable doubt that Mr. Lamonte exposed his penis when he urinated." (Appellant's Br. at 6.) Lamonte relies on *Townsend v. State*, 750 N.E.2d 416 (Ind. Ct. App. 2001) to support his argument. A police officer saw Townsend walking down the street with his knees held closely together. The officer followed Townsend as he walked behind a gas station, where the officer saw Townsend standing with his back to the officer and facing the building with his hands in front of him as if he were holding something. *Id.* After Townsend was startled and turned around, the officer saw Townsend's pants were unzipped, there was a

big wet spot on the front of his pants, and a puddle of urine was flowing on the ground away from the building. *Id.* The officer smelled the odor of urine but did not see Townsend's penis or a stream of urine coming from him. *Id.*

We reversed Townsend's public indecency conviction.[2] The evidence was sufficient to draw the inference Townsend had urinated in a public place, but no evidence directly or circumstantially established that he exposed his penis while urinating. *Id.* at 419. We also stated "the evidence does not even establish that Townsend had a penis, much less that he knowingly or intentionally exposed it." *Id.*[3]

Here, Officer Mcclain saw Lamonte's penis, so the trial court had direct evidence Lamonte had exposed his penis while urinating. Officer McClain testified that after Lamonte walked into the alley, he walked up beside Lamonte and "saw him urinating and put his penis back into his pants." (Tr. at 6.) When asked whether he had "any question in [his] mind that [Lamonte] pulled out his penis and urinated on the side of the street,"

[2] Townsend was convicted of public indecency under Ind. Code § 35-45-4-1 for knowingly or intentionally appearing in a public place in a state of nudity. In 2003, the legislature amended this statute and codified this crime under Ind. Code § 35-45-4-1.5(b).

[3] As writing judge on this case, I note that I dissented in *Townsend* because the effect of the majority's decision was to prevent any public indecency conviction based on circumstantial evidence. *See Townsend*, 750 N.E.2d at 419 (May, J., dissenting).

Officer McClain responded, "No question, sir." (Id. at 9.) Accordingly, there was sufficient evidence Lamonte was in a state of nudity.[4]

Finally, Lamonte suggests the evidence is insufficient to support his conviction because he did not knowingly or intentionally expose his penis to the public. As we explained in *Whatley*, it is not the observation of nudity that the statute proscribes; rather, the prohibition is against a person's appearance in a public place in a state of nudity. 708 N.E.2d 66 at 68. The evidence is sufficient to show Lamonte knowingly and intentionally appeared in a public place in a state of nudity.[5]

Affirmed.

BAKER, C.J., and BARNES, J., concur.

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[4] Lamonte cites to *Stout v. State*, 612 N.E.2d 1076 (Ind. App. Ct. 1993), *trans. denied*, and suggests that Officer McClain's testimony was incredibly dubious. We will not impinge on the trier of fact's resolution of credibility disputes unless a witness's testimony is so "incredibly dubious or inherently improbable that it runs counter to human experience." *Id.* at 1081. While Officer McClain's testimony that Lamonte exposed his penis when urinating may be uncorroborated, such testimony does not run counter to human experience nor is it incredibly dubious. Accordingly, we will not impinge upon the trial court's credibility finding.

[5] Lamonte also claims that he acted out of necessity. Lamonte has waived any claim to the defense of necessity--also referred to as the "choice of evils" defense, *see Toops v. State*, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994)--because it was not properly raised at trial. To prevail on a claim of necessity, a defendant must show: (1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good faith belief that his act was necessary to prevent a greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must not have substantially contributed to the creation of the emergency. *Id.* at 390. Lamonte's testimony regarding his offense of public nudity did not sufficiently raise the defense at trial.