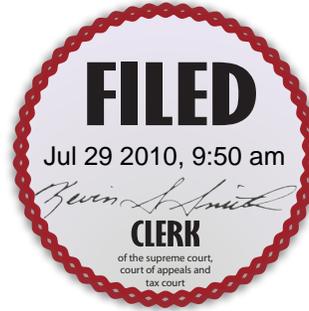


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JOEL M. SCHUMM
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RYAN WHITLEY,)

Appellant-Defendant,)

vs.)

No. 49A05-1001-CR-34

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
Cause No. 49F24-0903-FD-28385

July 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Ryan Whitley appeals his conviction for Class D felony public indecency. We affirm.

Issues

Whitley raises two issues, which we reorder and restate as:

- I. whether the trial court properly refused his tendered jury instruction; and
- II. whether there is sufficient evidence to support his conviction.

Facts

The evidence most favorable to the conviction is that on February 26, 2009, Whitley went into a public restroom at Claypool Courts in Indianapolis and entered a handicapped stall. Indianapolis Metropolitan Police Department Officer Joshua Shaughnessy was in the restroom in plain clothes to investigate complaints of inappropriate activity there. The doors on the stalls of this restroom are considerably shorter than those in many restrooms. Judging by the photographs in the record, when an average height person is standing up in the stall, his entire upper torso would be visible from any angle.

After Whitley went into the stall, Officer Shaughnessy, who was standing by the restroom sinks, noticed that Whitley was partially standing up and craning his neck to look over the stall door at another person in the restroom. Officer Shaughnessy also saw that Whitley was moving one of his arms. Officer Shaughnessy then walked towards the

stall, and from about four or five feet away from the stall was able to see that Whitley was masturbating. Whitley made eye contact with Officer Shaughnessy and continued masturbating. After thirty seconds or a minute, Officer Shaughnessy returned to the sink area and then walked back towards Whitley's stall a couple of minutes later. Officer Shaughnessy saw that Whitley was still masturbating and then left the restroom to confer with another officer, Steven Brinker. When Whitley left the restroom, Officer Brinker directed him to a security office inside the adjacent Circle Center Mall. There, Officer Shaughnessy read Whitley his Miranda rights and questioned him about what he had been doing in the restroom. Whitley claimed that he had pain in his groin, and that it helped when he "tugged and pulled" on his penis. Tr. p. 25.

The State charged Whitley with public decency, which was elevated from a Class A misdemeanor to a Class D felony because Whitley has a 2006 conviction for public indecency. A jury trial was held on September 29, 2009. Whitley tendered, and the trial court refused to give, a jury instruction purporting to define "public place" for purposes of the public indecency statute. The jury found Whitley guilty of committing Class A misdemeanor public indecency, and Whitley stipulated that he had a prior public indecency conviction so as to support the Class D felony conviction. Whitley now appeals.

Analysis

I. Jury Instruction

We first address Whitley's claim that the trial court erred in refusing to give his jury instruction regarding what constitutes a "public place" for purposes of public indecency. We review a trial court's refusal to give a tendered instruction for an abuse of discretion. Walden v. State, 895 N.E.2d 1182, 1186 (Ind. 2008). In our review we must address the following questions: (1) whether the tendered instruction is a correct statement of the law; (2) whether there was evidence in the trial record to support giving the tendered instruction; and (3) whether the substance of the tendered instruction was covered by another instruction or instructions. Id.

The central issue here is whether the tendered instruction correctly stated the law. The proposed instruction read, "Restroom stall is not a 'public place' for the purposes of sec. 35-45-4-1. A restroom stall, enclosed by partitions of sufficient height so that users' conduct or condition is not visible to the casual public eye, is not a public place." App. p. 65. As authority for these propositions, the instruction references our supreme court's decision in Chubb v. State, 640 N.E.2d 44 (Ind. 1994).

In Chubb, the defendant was charged with one count of public indecency. Although the information contained only one count, it alleged that the defendant committed the crime either by appearing nude in a public place, or by fondling another person's genitals in a public place. Our supreme court held that as a general matter, "a restroom stall, enclosed by partitions of sufficient height so that users' conduct or

condition is not visible to the casual public eye, is not a public place.” Chubb, 640 N.E.2d at 47. Thus, the defendant could not be guilty of public indecency on the basis that he appeared nude in the restroom stall. Otherwise, the court stated, it “would effectively render the ordinary use of a public restroom a crime.” Id.¹

That was not the end of the court’s analysis, however. It went on to hold that there was sufficient evidence of public indecency on the basis of the defendant reaching over the stall barrier and fondling a police officer. Id. Furthermore, the court stated:

In the present case, the defendant was not charged with fondling himself or another within the same stall. By our decision today, we do not imply that such conduct would fail to satisfy the “public place” element of the public indecency statute if accompanied by audible sounds, visible movement, or otherwise imposing upon the public.

Id. at 47 n.3.

Given this language, Whitley’s tendered instruction defining “public place” was not an accurate statement of the law. It was incomplete, in that it purported to define whether a restroom stall was a “public place” solely by reference to the height of the stall’s partitions. As footnote three in Chubb indicates, however, that is not the end of the analysis in the case of a defendant allegedly fondling himself within an enclosed stall.

¹ At the time Chubb was decided, the public indecency statute criminalized knowingly or intentionally appearing in a state of nudity in a public place under any circumstances. In 2003, the General Assembly modified that part of the public indecency statute to provide that it was a crime to appear in a state of nudity in a public place, only if the person had “the intent to arouse the sexual desires of the person or another person.” Ind. Code § 35-45-4-1(a)(3). This modification would seem to address the Chubb court’s concern about criminalizing the ordinary use of a public restroom stall, because to be convicted of public indecency under the current statute a defendant must do more than merely appear nude in a public place.

Per Chubb, even a defendant within a fully enclosed stall in a public restroom may be convicted of public indecency if he is fondling himself in such a manner that it is “imposing upon the public” because of movement, sounds, or other factors. Whitley’s tendered instruction would have misled the jury by not informing it of this possibility. The trial court did not abuse its discretion in refusing to give the instruction.

II. Sufficiency of the Evidence

Next, we address Whitley’s claim that there was insufficient evidence to support his conviction. When we review the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). “It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.” Id. When confronted with conflicting evidence, we must consider it in a light most favorable to the conviction. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

To convict Whitley of public indecency as charged, the State was required to prove that he knowingly or intentionally fondled his genitals in a public place. See I.C. § 35-45-4-1(a)(4). Whitley does not now dispute that he was, in fact, fondling his genitals in the public restroom stall, but maintains he was not in a “public place” when doing so. As already discussed, there are essentially two steps in analyzing whether Whitley’s conduct was covered by the public indecency statute. First is a consideration of whether

the stall's partitions were of sufficient height so that Whitley's conduct or condition would not have been visible to the casual public eye. Chubb, 640 N.E.2d at 47. Second, we consider whether there is evidence that Whitley's masturbation was accompanied by audible sounds, visible movement, or other factors that might have imposed upon the public. Id. at 47. n.3.

Here, the stall doors of the restroom were not full-sized doors. They appear to be about one-half the height of a typical public restroom stall door, leaving the entire torso of a standing person of average height visible to anyone in the restroom. Thus, Whitley's masturbation was much more readily noticeable than might have been the case in an "ordinary" public restroom stall.

In fact, Officer Shaughnessy testified that he could see Whitley's arm moving when he was standing at the restroom sinks. In other words, any member of the public coming into the restroom and washing his hands could have seen Whitley's arm moving, which clearly was consistent with masturbation. Additionally, Whitley was partially standing up, further exposing himself to those outside of the stall. Officer Shaughnessy was able to see Whitley's penis four or five feet away from the stall. Whitley was looking at people outside the stall while he masturbated, including Officer Shaughnessy, which clearly could be disconcerting or "imposing" to anyone in the restroom who could also see Whitley's arm moving. Finally, Whitley made no attempt to hide his conduct when Officer Shaughnessy walked towards the stall. We conclude this combination of evidence—the shortened height of the stall door, the visible movement of Whitley's arm,

Officer Shaughnessy's ability to see Whitley masturbate his erect penis from several feet away, and Whitley looking at others in the restroom and making eye contact with Officer Shaughnessy—is sufficient to support Whitley's conviction for public indecency, as that statute has been interpreted by our supreme court.

Conclusion

The trial court did not err in refusing to give Whitley's tendered jury instruction, and there is sufficient evidence to support his conviction. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.