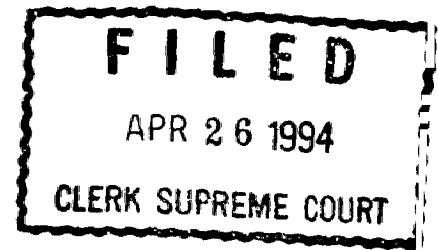


IN THE COURT OF APPEALS OF IOWA

No.4-059 / 93-577



STATE OF IOWA,

Appellee,

vs.

RANDY A. HOWARD,

Appellant.

Appeal from the Iowa District Court for Johnson County,
John R. Sladek, Judge.

Randy Howard appeals from his conviction, following a jury trial, of indecent exposure in violation of Iowa Code section 709.9 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Habhab and Cady, JJ., but decided by Habhab, P.J., Cady, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

CADY, J.

Randy Howard appeals from his conviction for indecent exposure in violation of Iowa Code section 709.9 (1991). He challenges the sufficiency of the evidence to support the conviction. He claims the State failed to prove his guilt beyond reasonable doubt and the trial court erred in denying his motion for judgment of acquittal.

The facts of this case date back to August 31, 1990. Karen Burton was at the main library on the University of Iowa campus. She was seated at a table studying between classes. She saw a man sit down at a nearby table, and soon noticed him staring in her direction. His hands were below the table. She sensed he might be masturbating, but she could not see his genitals from her seat.

Burton stood up and approached the man. She looked down toward his lap and saw his penis exposed from the zipper of his pants. The man saw her looking and covered himself. She told him to leave. The man quietly apologized and left. Burton reported the incident to campus security.

Twelve days later Burton saw the same man at the library. She tried to summon campus security, but the man left. She again saw the man about one year later.

In September 1992 Burton once again saw the man at the library. She followed him until he entered a van and copied the license plate number. The van was traced to defendant Randy Howard's employer. Subsequently, the State charged Howard with indecent exposure.

The case was tried to a jury. The State presented testimony from a campus security officer and Karen Burton. Howard testified he remembered an encounter with a woman in the library. He denied exposing himself but claimed he made a "defiant" gesture towards his lap when the woman approached him because he was angry.

The district court denied Howard's motions for judgment of acquittal. The jury found him guilty as charged. The district court entered judgment and sentenced him to 360 days in jail, suspended all but thirty days, and placed him on probation.

I.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference

of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

Howard first challenges Burton's identification of him as the perpetrator. He claims the encounters were too brief and sporadic for her to accurately identify him as the man who exposed himself to her.

There are many factors to consider in determining whether an identification of the accused is reliable, including the opportunity to view the accused at time of the crime, the witness's degree of attention, accuracy of the prior description of the accused, level of certainty demonstrated at confrontation, and time between the crime and confrontation. See Williams v. Lockhart, 736 F.2d 1264 (8th Cir. 1984); State v. Newman, 326 N.W.2d 788, 794-95 (Iowa 1982). Considering these factors, we find the evidence was sufficient to convince a rational juror that Howard was the man Burton encountered at the library. Although two years passed between the incident and arrest,

Burton observed Howard on several different occasions during this time. The initial encounter lasted up to two minutes. Burton was alert, focused, and curious. The unique circumstances gave her a good opportunity to develop a mental image of the person, confirmed by several subsequent observations. Burton testified at trial with absolute certainty that Howard was the man who exposed himself at the library.

II.

Howard next claims that even if he was in fact the man in the library that day and did in fact have his exposed penis in his lap, the indecent exposure statute does not apply to him. He argues Burton voluntarily walked over to him to view his penis and did so even when she sensed he may have been masturbating.

We agree with Howard that the statute does not apply to willing and consensual conduct. See State v. Bauer, 337 N.W.2d 209, 211 (Iowa 1983). However, we fail to see how Burton willingly or voluntarily viewed Howard's penis. The incident took place in a well-lit section of a university public library during business hours. Burton's presence in the room was clearly known. She approached Howard to confirm her suspicion that he was masturbating. When Burton arrived at Howard's table his pants were unzipped, and his penis was exposed. He did nothing to cover his genitals until Burton confronted him and told him to leave. We are simply unable to conclude that Burton's mere

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presence in a well-lit public place during business hours and subsequent investigation of her suspicions rises to the level of willing or voluntary viewing. See also State v. Bilder, 529 N.E.2d 1292 (Ohio App. 1987) (affirmed defendant's conviction for indecent exposure when a woman sitting one row in front of him looked back and saw that his genitalia were exposed through a hole in his trousers). The crime of indecent exposure cannot be evaded merely because the exposure was witnessed through chance or suspicion. See State v. Stodola, 134 N.W.2d 920, 922 (Iowa 1965) (victim did not consent to injury by approaching defendant in public place with fear that trouble may result). A suspicious observer can be an unwilling observer.

Finally, Howard argues the State failed to show he specifically intended to arouse or satisfy his or Burton's sexual desire through his conduct. We find sufficient evidence from which the jury could conclude Howard was masturbating and thus, by the very nature of the act, intended to arouse his own sexual desires. See Bauer, 337 N.W.2d at 212.

We affirm Howard's conviction.

AFFIRMED.