MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Barbara J. Simmons
Batesville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joshua Whitmore,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 11, 2023

Court of Appeals Case No. 23A-CR-900

Appeal from the Marion Superior Court

The Honorable Mark Rothenberg, Judge

The Honorable Richard Hagenmaier, Magistrate

Trial Court Cause No. 49D19-2301-CM-1507

Memorandum Decision by Judge Kenworthy
Chief Judge Altice and Judge Weissmann concur.

Kenworthy, Judge.

Case Summary

[1] Joshua Whitmore appeals his convictions for Class A misdemeanor public indecency[1] and Class B misdemeanor public nudity,[2] arguing insufficient evidence supports his convictions. Concluding sufficient evidence supports both convictions, we affirm.

Facts and Procedural History

[2] Teresa Smilko was the Environmental Service Supervisor for Eskenazi Hospital. One day, just after noon, Smilko left work and walked to her parked car in the hospital's nearby parking garage. The parking garage has two sections: one for employees and one for the public. Smilko was parked in the employee section of the lot. Gates at the entrance to the employee section prevent drivers without an employee ID from entering. But pedestrians can walk through or around the gates. Both sections of the garage share an elevator accessible to hospital employees and the public.

[3] Soon after Smilko entered her vehicle, she heard knocking on her driver's side window. She looked out and saw Whitmore facing her with "his pants pulled down to his ankles." *Tr. Vol. 2* at 31. Whitmore was "masturbating" as he knocked on Smilko's window. *Id.* Smilko quickly called hospital security. As Smilko was on the phone with security, Whitmore pulled up his pants, went to

---

[1] Ind. Code § 35-45-4-1(a)(4) (2020).

[2] I.C. § 35-45-4-1.5(c) (2014).

another row of vehicles, and "pulled down his pants and showed [Smilko] his behind." *Id.* A few minutes later, security arrived. Whitmore was arrested.

[4] The State charged Whitmore with Class A misdemeanor public indecency and Class B misdemeanor public nudity. Following a bench trial, Whitmore was found guilty as charged.

Sufficient Evidence Supports Whitmore's Convictions

[5] Whitmore contends the State failed to present sufficient evidence to support his convictions. A sufficiency-of-the-evidence claim warrants a "deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility[.]'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). Rather, "we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). "We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)).

A. Sufficient Evidence Whitmore Committed Public Indecency

[6] To convict Whitmore of public indecency as charged, the State was required to prove three elements beyond a reasonable doubt: that he (1) knowingly or intentionally; (2) fondled his genitals; (3) in a public place. I.C. § 35-45-4-

1(a)(4). Whitmore challenges only the sufficiency of the evidence proving the employee section of the hospital's parking garage constituted a "public place" under the statute. *See Appellant's Br.* at 8.

[7] Although "public place" is not defined by the public indecency statute, a panel of this Court previously held that a "public place," for purposes of the crime of public indecency, is any place that members of the public are free to go without restraint. *Long v. State*, 666 N.E.2d 1258, 1260 (Ind. Ct. App. 1996).[3] When determining whether a place is a "public place" within the meaning of the public indecency statute, one factor we consider is whether it is "reasonably foreseeable" someone will potentially witness the conduct. *Lasko v. State*, 409 N.E.2d 1124, 1129 (Ind. Ct. App. 1980). After all, the aim of the public indecency statute is to "protect the non-consenting viewer who might find . . . a spectacle repugnant." *Thompson v. State*, 482 N.E.2d 1372, 1375 (Ind. Ct. App. 1985) (quotation omitted).

[8] Turning to this case, the State presented sufficient evidence that the employee portion of the hospital parking lot constitutes a "public place" for purposes of the public indecency statute. A pedestrian—like Whitmore—was free to access both sections of the hospital parking garage. Although gates guarded the

---

[3] On numerous occasions in the context of public intoxication, panels of this Court have defined public place consistent with the definition in *Long*. *See, e.g.*, *Wright v. State*, 772 N.E.2d 449, 456 (Ind. Ct. App. 2002) (explaining "public place" in the context of the public intoxication statute "does not mean a place devoted solely to the use of the public; but it means a place which 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") (quoting *State v. Tincher*, 51 N.E. 943, 944 (Ind. App. 1898)).

vehicle entrance to the employee section, members of the public could easily walk around or through the gates. And the shared elevator provided access to both the public and employee sections. Sufficient evidence supports Whitmore's public indecency conviction.

B. Sufficient Evidence Whitmore Committed Public Nudity

[9] Whitmore also challenges the sufficiency of the evidence supporting his public nudity conviction. To convict Whitmore of public nudity as a Class B misdemeanor, the State had to prove four elements beyond a reasonable doubt: that he (1) knowingly or intentionally; (2) appeared in a public place; (3) in a state of nudity;[4] (4) with the intent to be seen by another person. I.C. § 35-45-4-1.5(c). Whitmore focuses his challenge on elements two and four, arguing the State presented insufficient evidence he appeared in a "public place" or intended to be seen by Smilko. *See Appellant's Br.* at 10.

[10] "Public place" in the public nudity statute means "any place where the public is invited and are free to go upon special or implied invitation[;] a place available to all or a certain segment of the public." *Weideman v. State*, 890 N.E.2d 28, 32 (Ind. Ct. App. 2008) (quoting *State v. Baysinger*, 397 N.E.2d 580, 583 (Ind. 1979)). Here, both sections of the parking garage were accessible and available to members of the public. A pedestrian could bypass the entry gates and gain

[4] Indiana Code Section 35-45-4-1(d) defines "nudity" in relevant part as "the showing of the human male . . . genitals, pubic area, or buttocks with less than a fully opaque covering . . . or the showing of covered male genitals in a discernibly turgid state."

access to the entire garage. Or he or she could take the elevator shared by both the employee and public sections of the garage. The State presented sufficient evidence that the employee portion of the garage constitutes a "public place" for purposes of the public nudity statute.

[11] Whitmore also claims the evidence is insufficient to show he intended to be seen by Smilko. "Intentionally" and "knowingly" are statutorily defined terms. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." I.C. § 35-41-2-2(a). And "[a] person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). Because a defendant's intent normally cannot be established with "mathematical precision," and can rarely be proved by direct evidence, it is "well established" a defendant's intent can be proved by circumstantial evidence. *Phipps v. State*, 90 N.E.3d 1190, 1195 (Ind. 2018) (internal quotation omitted); *see also White v. State*, 772 N.E.2d 408, 413 (Ind. 2002) (explaining the factfinder can determine the existence of the requisite intent using "reasonable inferences based on examination of the surrounding circumstances").

[12] Whitmore approached Smilko's vehicle and repeatedly knocked on her driver's side window. As he stood there knocking—drawing Smilko's attention toward him—Whitmore faced Smilko with "his pants pulled down to his ankles." *Tr. Vol. 2* at 31. And when Whitmore briefly walked away from Smilko's vehicle, he exposed his backside in her direction. The State presented sufficient

evidence Whitmore intended to be seen by Smilko when committing the charged offense.

Conclusion

[13] Because sufficient evidence supports Whitmore's convictions, we affirm.

[14] Affirmed.

Altice, C.J., and Weissmann, J., concur.