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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1619**

Bradley D. Fordyce, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 29, 2022
Affirmed
Cochran, Judge**

Crow Wing County District Court
File No. 18-CR-19-2588

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Janine L. LePage, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Cochran, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this appeal from the district court's denial of his petition for postconviction relief, appellant challenges his conviction of indecent exposure. Appellant argues that (1) his conviction must be reversed because the evidence presented at trial was insufficient to

prove the “place” element of the indecent-exposure offense, and (2) alternatively, he is entitled to a new trial because the district court erroneously denied his motion for a mistrial after a state witness offered improper testimony.

First, we conclude that the state presented sufficient evidence to allow the jury to conclude that the “place” element of the offense was satisfied. Second, we conclude that the district court did not abuse its discretion by denying appellant’s motion for a mistrial. We therefore affirm the district court’s denial of appellant’s postconviction petition.

FACTS

Police cited appellant Bradley Fordyce for misdemeanor indecent exposure, in violation of Minn. Stat. § 617.23, subd. 1(1) (2018), after a neighbor reported that she saw Fordyce standing naked in his backyard. Because Fordyce had a prior conviction of indecent exposure, respondent State of Minnesota subsequently charged Fordyce with gross-misdemeanor indecent exposure, in violation of Minn. Stat. § 617.23, subd. 2(2) (2018). The case proceeded to a jury trial.

Evidence Presented at Jury Trial

The jury heard testimony from two witnesses: Fordyce’s neighbor who reported seeing Fordyce naked, and the investigating officer. At the time of the incident, the neighbor lived in a house on the other side of an alley from Fordyce’s house. The two houses were both located near a main road from which the alley was accessed. Fordyce’s backyard had a fence along the sides, but there was no fence along the part facing the alley. Because there was no privacy fence along the back, Fordyce’s backyard was visible to his neighbor from her property and to passersby along the alley.

The neighbor testified that, around 9:00 on the morning of July 1, 2019, she was going to her back porch to water her flowers when she saw Fordyce in his backyard not wearing any clothes. The neighbor was standing just inside the back door of her enclosed porch, and Fordyce was standing naked in his backyard near the back door of his house. As the neighbor watched him, Fordyce turned to face her direction and then to face the wall of his house. When Fordyce turned around, the neighbor could see his buttocks.

Disturbed by Fordyce's behavior, the neighbor went outside onto her deck and used her cell phone to take two pictures of Fordyce. The state introduced the two photographs into evidence at trial. The photographs depict Fordyce from the front, standing just outside his back door. He appears to be smoking a cigarette. His genitals are not visible in the photographs; a black area appears where his genitals are. The parties disputed at trial whether the black area was a shadow or a piece of fabric. The neighbor testified that, based on her view of Fordyce when she took the picture, she did not believe the photo depicted a piece of fabric. She further testified that, when she viewed Fordyce from behind, she only saw his buttocks and did not see any lines of fabric across his back. She also had no doubt that Fordyce was naked in his backyard on the date in question. After taking the photographs, the neighbor drove to the police station and reported the incident.

The investigating officer testified that the neighbor told him that she had seen Fordyce standing outside naked and showed the officer the pictures she had taken. The officer then went to Fordyce's house. When the officer arrived, Fordyce was standing by his back door and was wearing shorts and a shirt with cutoff sleeves. The officer explained to Fordyce that the police had received a complaint that he was standing naked outside his

back door. Fordyce responded that he had been wearing clothes at the time. The officer advised Fordyce that he had a picture showing Fordyce naked. The officer then arrested Fordyce.

The officer returned to Fordyce's property several days later and took approximate measurements of distances. The officer estimated that Fordyce's back door, near where he had been standing naked, was 40 to 50 feet from the alley. Relying on the neighbor's photographs, the officer measured that the neighbor and Fordyce must have been standing approximately 79 feet apart when the neighbor saw him naked.

Redirect Testimony and Motion for Mistrial

During redirect examination of the officer, the prosecutor asked the officer about the circumstances surrounding Fordyce's arrest. The defense attorney objected, and the district court overruled the objection. The following exchange then took place between the prosecutor and the officer:

Q: What were the circumstances surrounding his arrest?

A: We had an apprehension and detention order for a violation of conditions of release [by Fordyce].

Q: What was that regarding?

A: Regarding past convictions for similar—

DEFENSE: Objection, Your Honor.

THE COURT: Sustained.

Q: Was he on probation?

A: Yes.

Q: What was he on probation for?

A: For incidents similar to—

DEFENSE: Objection, Your Honor.
THE COURT: Sustained.

Q: Do you know what—

A: I do not know specifically what he was on probation for. We were in contact with his probation officer.

Q: And his probation officer directed you to take him into custody; is that right?

A: That is correct.

After this exchange, the defense attorney asked the district court to give a curative instruction to the jury to address the testimony for which the district court had sustained the objections. The district court told the jury: “[T]here are times when there is an objection and I make a ruling. You are not to speculate about the nature of my ruling, why the ruling is the way it is, or what would have happened if I had ruled differently.”

The state then rested its case in chief, the jury was excused, and the court went into recess to hold a bench conference. At that time, the defense attorney moved for a mistrial. The defense attorney argued that the officer’s testimony that Fordyce was on probation for “similar” offenses was improper because the district court issued a ruling before trial that precluded the parties from referencing Fordyce’s prior incidents of indecent exposure, the officer’s testimony was inaccurate because Fordyce was actually on probation for a burglary offense which is not a “similar” offense, and the officer’s testimony would cause the jury to infer that Fordyce was on probation for an indecent-exposure offense. The district court denied the motion for a mistrial, reasoning that the officer’s testimony likely would not impact the jury’s decision and noting that the district court had given a curative instruction.

Jury Verdict and Sentence

Fordyce waived his right to testify, and the defense did not call any witnesses. The jury found Fordyce guilty of indecent exposure. The district court later sentenced Fordyce to one year in the county jail but stayed execution of the sentence for two years on probationary conditions.

Postconviction Petition

In June 2021, Fordyce filed a petition for postconviction relief challenging his conviction of indecent exposure.¹ Fordyce's postconviction petition sought reversal of his conviction or, alternatively, a new trial. The petition raised two grounds for relief. First, Fordyce argued that the state failed to prove a necessary element of the offense because Fordyce was not in a "public place" when he exposed himself. Second, Fordyce argued that the district court erred by denying his motion for a mistrial because the officer improperly testified that Fordyce was on probation for "similar" crimes.

After a hearing on the petition, the district court denied Fordyce's postconviction petition in an October 2021 order. The district court determined that the state had presented sufficient evidence to prove the "place" element of the offense because the evidence showed that Fordyce's conduct was "likely to be observed" by a neighbor or passerby. The district court also determined that it did not err when it denied Fordyce's motion for a mistrial because there was no reasonable probability that the officer's improper statements affected the outcome of the trial. In reaching this determination, the district court

¹ Fordyce did not file a direct appeal.

emphasized that the state offered no additional evidence about Fordyce’s prior offenses, the state made little reference to the testimony and in closing arguments focused on the neighbor’s testimony, and the district court gave the jury a cautionary instruction. Thus, the district court denied Fordyce’s postconviction petition in its entirety.

Fordyce appeals.²

DECISION

Fordyce challenges the district court’s decision denying his petition for postconviction relief. We review the district court’s denial of a postconviction petition for an abuse of discretion. *Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020). A district court abuses its discretion if its decision misapplies the law or is contrary to logic and the facts in the record. *Id.*

Fordyce argues that the district court’s postconviction decision was erroneous for two reasons: (1) the evidence was insufficient to support his conviction of indecent exposure because the state failed to prove the “place” element of the offense; and (2) the district court erred by denying his motion for a mistrial after the officer offered inadmissible testimony that Fordyce was on probation for “similar” offenses. We address each argument in turn.

² In lieu of filing a respondent’s brief, the county attorney’s office submitted a letter to this court stating that it supported the district court’s postconviction decision and asking this court to decide this matter on the record.

I. The state presented sufficient evidence to prove the “place” element of the indecent-exposure offense.

Fordyce first challenges the sufficiency of the evidence to support his conviction of indecent exposure. To evaluate the sufficiency of the evidence, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [jury] to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). In doing so, we view the evidence in the light most favorable to the jury’s verdict, and we assume that the jury disbelieved any evidence conflicting with the verdict. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). We will not overturn the verdict if the jury, “upon application of the presumption of innocence and the [s]tate’s burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.” *Id.*

We begin our analysis by considering the nature of the charged offense. The indecent-exposure statute provides:

A person who commits any of the following acts *in any public place, or in any place where others are present*, is guilty of a misdemeanor:

- (1) willfully and lewdly exposes the person’s body, or the private parts thereof;
- (2) procures another to expose private parts; or
- (3) engages in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision.

Minn. Stat. § 617.23, subd. 1 (emphasis added).³ In his primary brief, Fordyce challenges the sufficiency of the evidence to prove the “place” element.⁴

The statute provides two ways to prove the “place” element: the defendant exposed himself (1) in “any public place” *or* (2) “in any place where others are present.” *Id.* The state therefore needed to present evidence sufficient to prove that *either* alternative was satisfied. Fordyce’s brief addresses only the first alternative. Fordyce’s brief does not address the second alternative.

Based on the evidence presented at trial, we conclude that there is sufficient evidence from which the jury reasonably could have concluded that either alternative of the “place” element was met.⁵ The evidence presented at trial shows that Fordyce was

³ The state charged Fordyce under Minn. Stat. § 617.23, subd. 2(2), which enhances the offense to a gross misdemeanor if a person violates subdivision 1 when he has previously been convicted under the same section or a criminal-sexual-conduct offense.

⁴ In a pro se supplemental brief, Fordyce asserts that the two photographs introduced into evidence at trial show that he was *not* naked. We construe Fordyce’s argument as a challenge to the sufficiency of the evidence of the “act” element. We conclude that the evidence presented is sufficient to prove that element of the offense. The photographs do not show Fordyce’s genitals, as the area around his hips appears darkened. But the neighbor testified that she saw Fordyce’s buttocks when he faced away from her and she did not see any lines of fabric to suggest that he was wearing anything. She also testified that she had no doubt that he was naked. Viewing the neighbor’s testimony in the light most favorable to the verdict, we conclude that the evidence is sufficient to prove that Fordyce lewdly exposed his body or private parts. In other words, the evidence is sufficient to prove the “act” element of the offense.

Fordyce also asserts in his pro se supplemental brief that the second photograph was never entered into evidence at trial and that his lawyer “hid[] the existence” of the photo from him. The record contradicts Fordyce’s assertion, as the district court admitted both photographs into evidence at trial.

⁵ In denying Fordyce’s postconviction petition, the district court concluded that the “place” element was met because Fordyce “was so likely to be observed, either by a neighbor or a passerby in the alley, that it must be reasonably presumed that [Fordyce’s] conduct was intended to be witnessed.” We agree with Fordyce that the district court’s analysis focused

standing naked in his backyard, just outside the back door of his house. An alley ran along the back of his backyard and was located close to a main road. There was no privacy fence separating the backyard and the alley. The neighbor saw Fordyce naked from across the alley and had a clear line of sight from her back porch and deck to Fordyce's back door.

Despite Fordyce being on his private property, the jury reasonably could have concluded that he was either in a public place or in a place where others were present. Fordyce was in a "public place" in the sense that he was in a place that was open to public view. The supreme court has recognized that the phrase "public place" is ambiguous and can have different meanings depending on context. *See State v. Serbus*, 957 N.W.2d 84, 88 (Minn. 2021) (interpreting the phrase "public place" for purposes of a statute prohibiting a person who is under the influence of alcohol from carrying a pistol in a public place). The supreme court in *Serbus* noted that one definition of "public" is "exposed to general view: conspicuous, open," and that a "public place" could mean a place that is "visible to[] people as a whole." *Id.* Here, Fordyce was in a place that was open to view from the alley behind his home and where he was easily visible to anyone passing through the alley. Similarly, Fordyce was in "a place where others are present" in the sense that he was within view of the neighbor, despite her being on her own property. One definition of "present"

on the wrong issue. Whether Fordyce was likely to be observed is relevant to the intent element of the offense rather than the "place" element. *See State v. Stevenson*, 656 N.W.2d 235, 241 (Minn. 2003) (explaining that the "relevant question" in determining intent to be indecent is whether the defendant's conduct "was so likely to be observed 'that it must be reasonably presumed that it was intended to be witnessed'" (quoting *State v. Peery*, 28 N.W.2d 851, 854 (Minn. 1947))). Here, however, Fordyce does not challenge the sufficiency of the evidence to prove the intent element. As such, the analysis in *Stevenson* and *Peery* does not inform our decision.

is “being in view or at hand.” *Merriam-Webster’s Collegiate Dictionary* 982 (11th ed. 2003). Because the neighbor was nearby and could easily view Fordyce in his backyard, the neighbor was “present.”⁶ The evidence presented at trial therefore reasonably allowed the jury to conclude that the “place” element was proven because Fordyce exposed himself either in a public place or in a place where others were present.

Fordyce also points to the Fourth Amendment’s protections against unreasonable searches and seizures to further support his position that the state did not prove the “place” element of the indecent-exposure statute. *See* U.S. Const. amend. IV. Fordyce argues that he had a reasonable expectation of privacy at the time of his offense because he was standing on the curtilage of his home, which is a constitutionally protected area. Fordyce’s reliance on Fourth Amendment jurisprudence is misplaced. The supreme court has expressly rejected the application of Fourth Amendment principles to the indecent-exposure statute. In *Stevenson*, this court affirmed the defendant’s conviction of indecent exposure when he committed lewd conduct in his truck, and we reasoned that the defendant was in a public place because he had a diminished expectation of privacy in his

⁶ We note that our interpretation of the term “present,” for purposes of Minnesota’s indecent-exposure statute, tracks closely with other states’ interpretations of their own indecent-exposure statutes. For example, an Oklahoma appellate court has interpreted Oklahoma’s indecent-exposure statute, which prohibits indecent exposure “in any public place, or in any place *where there are present other persons* to be offended or annoyed thereby.” *Davison v. State*, 281 P.2d 196, 197 (Okla. Crim. App. 1955) (emphasis added). Relying on dictionary definitions of “present,” the Oklahoma court determined that the indecent-exposure statute encompasses situations in which a person exposes himself “in any place where others are present, *in view of*, being before him, or *in sight of* him.” *Id.* at 198 (emphasis added); *see also Martin v. State*, 674 P.2d 37, 39 (Okla. Crim. App. 1983) (applying *Davison* and noting that indecent exposure need not occur in a public place and may include private property if others are present).

truck. 656 N.W.2d at 240. But the supreme court held that our emphasis on the defendant's expectation of privacy misconstrued the focus of indecent-exposure caselaw. *Id.* The supreme court explained: "Our concept of 'public' was not based on the privacy expectations of the defendant but on the likelihood that the conduct would be witnessed by others." *Id.* at 240-41. Thus, Fourth Amendment principles do not guide our analysis.

For these reasons, we reject Fordyce's challenge to the sufficiency of the evidence supporting his indecent-exposure conviction.

II. The district court did not abuse its discretion by denying Fordyce's motion for a mistrial.

Fordyce next challenges the district court's decision to deny his motion for a mistrial. At trial, Fordyce moved for a mistrial after the officer, on redirect examination, alluded to the fact that, at the time of his arrest, Fordyce was on probation for "similar" offenses. Fordyce argues that the officer's testimony on this point was inadmissible and that there is a reasonable probability that the jury would not have found him guilty if it had not heard the testimony.

We review the district court's denial of a motion for a mistrial for an abuse of discretion. *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). "[T]he district court is in the best position to evaluate the prejudicial impact, if any, of an event occurring during the trial." *Bahtuoh*, 840 N.W.2d at 819. In determining whether there is a reasonable probability that

the outcome of the trial would have been different, courts consider various factors, including the extent of the improper testimony and the strength of the state's case. *See id.* (concluding that the defendant was not prejudiced by an improper reference to the defendant's possible involvement in another shooting when the reference was "isolated and brief" and the state's case against the defendant was strong); *State v. Farr*, 357 N.W.2d 163, 166 (Minn. App. 1984) (determining that an investigator's improper testimony was unlikely to have played a significant role in the jury's decision to convict the defendant "because the remark was of a passing nature, the impact of which might have been missed by the jury, and because the other evidence was overwhelming").

Even accepting Fordyce's argument that the officer's testimony about Fordyce's probation status due to "similar" offenses was improper, we discern no abuse of discretion by the district court in determining that this testimony did not significantly affect the outcome of the trial. The district court properly reached this conclusion based on the limited nature of the officer's testimony.

At trial, the officer made a passing reference to Fordyce's prior offenses, and he did so in vague terms—saying only that Fordyce was on probation for "similar" incidents. Importantly, the officer then acknowledged that he did not actually know "specifically what" Fordyce was on probation for. Aside from this isolated, vague reference, the state offered no evidence at trial that Fordyce was on probation or that he had been convicted of indecent exposure in the past. Nor did the prosecutor mention the officer's testimony on that point during her closing argument. Instead, the prosecutor urged the jury to find Fordyce guilty based on the neighbor's testimony and the two photographs showing

Fordyce naked. Because the evidence presented at trial and the prosecutor’s closing argument appropriately focused on the neighbor’s testimony and the photographs, it is highly unlikely that the officer’s vague, passing reference to Fordyce having committed “similar” incidents influenced the jury’s decision to find him guilty.

We add that the district court judge who decided Fordyce’s postconviction petition was the same judge who presided over his trial. The district court therefore was in the best position to assess the impact of the improper testimony on the trial. *See Bahtuoh*, 840 N.W.2d at 819. For these reasons, we discern no abuse of discretion in the district court’s determination that there was no reasonable probability that the outcome of the trial would have been different without the officer’s testimony about Fordyce’s “similar” incidents.⁷

⁷ Fordyce also argues that the district court applied the wrong legal standard because it referred to the “manifest necessity” standard when it orally denied his motion for a mistrial from the bench. The “manifest necessity” standard applies when a mistrial is declared “without the defendant’s consent,” and it requires that “[a] high degree of necessity . . . must exist before a mistrial is appropriate.” *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997). Fordyce is correct that the “manifest necessity” standard does not apply here because the mistrial was sought at his request, not over his objection. Although the district court’s reference to “manifest necessity” at trial was incorrect, the record nonetheless shows that the district court applied the correct standard. The district court stated that it considered whether the improper testimony was prejudicial, as well as “the nature of the case, the emphasis upon the argument and the likely impact upon the jury”—which are appropriate considerations in determining whether to grant a mistrial. And the district court cited the correct legal standard—whether there was a reasonable probability that the improper evidence significantly affected the verdict—when it denied Fordyce’s postconviction petition. For this reason, the district court’s reference to the “manifest necessity” standard at trial is not a basis for reversal.

Accordingly, the district court did not abuse its discretion by denying Fordyce's motion for a mistrial, or by denying his postconviction petition.

Affirmed.