2016 IL App (2d) 140610-U
No. 2-14-0610
Order filed June 29, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-2208
NATHAN REED,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of public indecency (lewd exposure); although defendant's penis was covered by his shirt, he nevertheless made it clearly identifiable to the victim and thus "exposed" it to her; (2) as the parties agreed, the trial court erred in ruling on a motion for summary judgment to determine defendant was fit; we remanded for a retrospective fitness hearing, at which, given defendant's jury demand, defendant would be entitled to a jury.

¶ 2 Following a jury trial, defendant, Nathan M. Reed, was convicted of public indecency (720 ILCS 5/11-30(a)(2) (West 2012)) and sentenced to three years' imprisonment. He appeals, contending that (1) he was not proved guilty beyond a reasonable doubt; (2) the trial court erred

when, after finding a *bona fide* doubt of defendant's fitness for trial, it granted summary judgment on the issue of fitness without making an independent decision and without honoring defendant's demand for a jury; and (3) he was erroneously ordered to pay a DNA analysis fee when he had given a DNA sample in connection with a previous conviction. We vacate the order granting summary judgment on the issue of fitness and remand the cause with directions.

¶ 3 Defendant was charged with public indecency based on having committed "an act of lewd exposure of his body." He initially represented himself. At a November 5, 2013, hearing, the trial court stated that, based on defendant's filings and his demeanor in court, it found a *bona fide* doubt of defendant's fitness. The court appointed the public defender to represent defendant, ordered a fitness examination, and continued the cause for status on defendant's fitness. Defendant objected.

¶ 4 A fitness evaluation report, prepared by Dr. Anthony Latham, concluded that defendant "has a factual and rational understanding of the nature and purpose of the proceedings and the capacity to assist an attorney in the preparation of a defense. Therefore, it is recommended that the court find [defendant] fit to enter a plea or to stand trial."

¶ 5 On November 25, 2013, the public defender stated that defendant was requesting a fitness hearing before a jury, but asked for a continuance to discuss the evaluation with defendant. On defendant's demand, the issue of his fitness was set for a jury hearing on February 18, 2014.

¶ 6 On that date, the public defender filed a motion for summary judgment, alleging that there was no genuine issue of material fact regarding defendant's fitness to stand trial and asking that defendant be found fit. Defendant objected to the motion and demanded a jury be impaneled to determine his fitness. The public defender responded, "So while I believe [defendant] absolutely has a right to have a jury determine his fitness if we proceed to a hearing, I think this

motion again would be dispositive of that, and I think it is not only my right but my duty to file this motion and ask the Court to go forward on it."

¶ 7 The prosecutor concurred with the public defender's motion. The trial court granted the motion over defendant's objection. The court stated as follows:

> "I have reviewed once again the fitness evaluation. And *** I agree that there is no factual issue that is in dispute. That the report from Dr. Latham after an interview with [defendant] finds that he is fit to stand trial and/or to plead. The State would be putting on Dr. Latham to give that very opinion as well as you, [defense counsel], would be putting on Dr. Latham to give that opinion.
>
> So since there is no factual issue, no one is arguing that [defendant] is unfit, I find [*sic*] and grant your motion for summary judgment; that there is no need for a trial or hearing with regard to the issue of fitness."

¶ 8 The court again allowed defendant to represent himself, appointing the public defender as standby counsel. The case was then set for jury trial.

¶ 9 At trial, Alice Johnson Bisanz testified that on August 6, 2013, she was walking in Century Park in Vernon Hills, where she walked every morning. As she approached a bench, she saw a man she did not recognize, whom she later identified as defendant. He was wearing khaki pants, a white t-shirt, and a colored shirt open in the front. As she passed the bench, the man looked at her and said hello. He said hello in a drawn-out manner that sounded "creepy." Defendant then looked down, which drew her gaze downward. She could make out his erect penis underneath the white shirt. Although the shirt completely covered his penis, she could easily identify it because the shirt was pulled "so tight" over it. His right hand was making a

slight up-and-down movement on his penis. She reiterated that his penis was covered by his shirt, but she could clearly make out the head.

¶ 10 Bisanz texted her husband and son to tell them what she had seen, then flagged down a police officer. Her husband and son testified that they received text messages from Bisanz on that day.

¶ 11 Officer Ken Berryhill testified that he was on patrol in Century Park on August 6, 2013, when Bisanz flagged him down. Berryhill found defendant in the park and arrested him.

¶ 12 Defendant presented no evidence. During deliberations, the jury sent out a note asking, "Does skin have to be exposed?" The trial court responded that the jury had been given the law and heard the facts, and that it should apply the facts to the law. After further deliberations, the jury found defendant guilty.

¶ 13 The court sentenced defendant to three years' imprisonment with credit for 315 days already served. Defendant was assessed $1,396 in fines and costs, which included a $250 DNA analysis fee. Defendant timely appeals.

¶ 14 Defendant first contends that he was not proved guilty beyond a reasonable doubt of public indecency. He argues that he could not properly be convicted of lewd exposure, because the only eyewitness testified clearly that his penis remained covered by his shirt at all times and thus was not "exposed" under the common definition of that word. We disagree.

¶ 15 Generally, where a defendant challenges on appeal the sufficiency of the evidence, we ask whether, after viewing all the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Here, although defendant frames the issue in terms of reasonable doubt, there were no conflicts in the evidence on the salient point: Bisanz

testified consistently that defendant's shirt covered his penis. Thus, the issue is whether defendant could be convicted of lewd exposure when his penis, although covered, remained clearly identifiable. To decide this issue, we must construe the public-indecency statute. The construction of a statute is an issue of law, which we review *de novo*. *People v. Diggins*, 235 Ill. 2d 48, 54 (2009).

¶ 16 As charged here, public indecency is a "lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person." 720 ILCS 5/11-30(a)(2) (West 2012). The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. *Diggins*, 235 Ill. 2d at 54. The best indicator of that intent is the statute's language, which we must give its plain and ordinary meaning. *Id*. Where the language of the statute is clear and unambiguous, we apply the statute as written, without resort to aids of statutory construction. *Id.* at 54-55.

¶ 17 "Exposure" is defined as "the condition of being presented to view or made known." http://www.merriam-webster.com/dictionary/exposure (last visited June 20, 2016). The common understanding of " 'lewd exposure' " indicates " 'a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others.' " *People v. Garrison*, 82 Ill. 2d 444, 456-57 (1980) (quoting *State v. Galbreath*, 419 P.2d 800, 803 (1966)). Both parties cite this definition in support of their respective positions. Defendant, noting that the definition refers to "private parts" that should "be customarily kept covered," (*id.*) argues that he is not guilty because his penis was in fact covered.

¶ 18 Defendant interprets "covered" too literally, as something can be "covered" and still be "exposed." The crux of the *Garrison* definition is a "lascivious exhibition" (*id.*), which does not

necessarily require that the private parts be completely uncovered. No one would seriously contend, for example, that something "covered" by sheer fabric or clear plastic was not also "exposed." See *People v. Stoehr*, 82 Ill. App. 3d 827, 829-32 (1980) (defendant properly convicted of public indecency for standing naked behind a window).

¶ 19 Although defendant's shirt was opaque, defendant nevertheless exposed himself to Bisanz. As she approached him, he said hello to her in a "creepy" manner, then drew her gaze to his penis, which, although covered by his shirt, was nonetheless clearly identifiable. She testified that he had the shirt stretched so tight that she could clearly make out the outline of his penis beneath it. Moreover, he was moving his hand up and down on it. Thus, defendant "made known" his private parts to Bisanz. This was precisely the type of conduct the statute was designed to prevent. See 720 ILCS Ann. 5/11-9, Committee Comments-1961, at 405 (Smith-Hurd 2002) (now codified as 720 ILCS 5/11-30(a)(2) (West 2012)) (provision applies to "those exposures which were shocking and disturbing to the immediate audience"). Defendant exposed himself as effectively, if not as graphically, as if his genitals had been completely uncovered.

¶ 20 Defendant relies on *People v. Neumann*, 20 Ill. App. 3d 825 (1974), but that case is readily distinguishable. There, the complaint charged the defendant with committing an act of public indecency, namely masturbation. The defendant moved to dismiss the complaint on the ground that it did not allege a lewd exposure. The appellate court agreed that the complaint failed to allege an essential element of the offense, noting that "masturbation of itself does not necessarily involve a lewd exposure." *Id.* at 827. In that case, there were simply no facts alleged from which a lewd exposure could be inferred. Here, the indictment did allege exposure and, as noted, the evidence proved that element.

¶ 21 At oral argument, defendant contended that he should have been charged under section 11-30(a)(1), which prohibits any "act of sexual penetration or sexual conduct." 720 ILCS 5/11-30(a)(1) (West 2012). It is true that section 11-30(a)(1) also prohibited defendant's conduct, but it does not follow that he was not properly charged under section 11-30(a)(2). As noted above, his conduct was also unlawful under that section.

¶ 22 Defendant next contends that the trial court erred by failing to conduct a fitness hearing after it found a *bona fide* doubt as to his fitness. Specifically, he argues that the trial court improperly disregarded his demand for a jury to decide the issue. He further argues that the court did not hold a hearing and independently decide the issue, but ruled on the public defender's motion for summary judgment. The State concedes that this was improper, and we agree.

¶ 23 The due process clause of the fourteenth amendment prohibits prosecuting a defendant who is unfit to stand trial. *People v. Holt*, 2014 IL 116989, ¶ 51 (citing *People v. Shum*, 207 Ill. 2d 47, 57 (2003)). A defendant is unfit if, based on a mental or physical condition, he is unable to understand the nature and purpose of the proceedings or to assist in his defense. 725 ILCS 5/104-10 (West 2012); *People v. Burton*, 184 Ill. 2d 1, 13 (1998).

¶ 24 "Normally, a trial court's decision that a defendant is fit to stand trial will not be reversed absent an abuse of discretion." *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). However, because the issue is constitutional, the record must show that the trial court affirmatively exercised its discretion in making that decision. *Id.*

¶ 25 "When a *bona fide* doubt as to a defendant's fitness exists, the trial court has a duty to hold a fitness hearing." *Id.* "A trial court's determination of fitness may not be based solely upon a stipulation to the existence of psychiatric conclusions or findings." *Id.* "[W]here the

parties stipulate to what an expert would testify, rather than to the expert's conclusion, a trial court may consider this stipulated testimony in exercising its discretion." *Id.* However, "[t]he ultimate decision as to a defendant's fitness must be made by the trial court, not the experts." *Id.* "A trial court must analyze and evaluate the basis for an expert's opinion instead of merely relying upon the expert's ultimate opinion." *Id.* The court should be active, not passive, in making the fitness determination. *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987).

¶ 26 "Where a trial court fails to conduct an independent inquiry into a defendant's fitness but, instead, relies exclusively on the parties' stipulation to a psychological report finding the defendant fit, the defendant's due process rights are violated." *People v. Cook*, 2014 IL App (2d) 130545, ¶ 15. However, where a trial court's finding of fitness is based not only on stipulations but also on its observations of the defendant and a review of a psychological report, the defendant's due process rights are not offended. See *People v. Lewis*, 103 Ill. 2d 111, 116 (1984); *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991); *People v. Mounson*, 185 Ill. App. 3d 31, 37-38 (1989).

¶ 27 The parties in the present case did not formally stipulate that defendant was fit to stand trial. However, the record reflects that they effectively made such a stipulation. Specifically, in her motion for summary judgment, the assistant public defender argued that "[g]iven the absence of any evidence that the Defendant is not fit to stand trial, Dr. Latham's report should be sufficient for a finding of fitness at Summary Judgment." The State asserted at the hearing on that motion that it "concur[red] with everything that is said" in the motion, emphasizing that defense counsel had "accurately portrayed everything that is in the fitness report" and that Dr. Latham had been repeatedly recognized as an expert by the courts. Defense counsel reiterated at

the hearing that "[w]e are certainly not maintaining that [defendant] is unfit." Under these circumstances, the parties effectively stipulated that defendant was fit to stand trial.

¶ 28 Similar to *Cook*, the trial court in the present case failed to conduct an independent inquiry into the issue of defendant's fitness. In granting the motion for summary judgment, the court simply found that "there is no factual issue that is in dispute." The court reasoned that Dr. Latham opined that defendant was fit, that both parties intended to elicit testimony to that effect from Dr. Latham, and that neither party was arguing that defendant was unfit. The court erred in relying on Dr. Latham's ultimate opinion as to defendant's fitness without independently evaluating the basis for that opinion and making findings based on the court's own observations.

¶ 29 Moreover, the court erred in failing to honor defendant's request for a jury determination on the issue of fitness. Defendant has "the right to personally demand a jury determination of fitness." *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 25. This is so even if defense counsel feels compelled "to take a position on fitness that is contrary to that of the defendant" at the hearing. *Id.* at ¶ 27.

¶ 30 Both parties agree that the matter should be remanded for a fitness hearing. However, they disagree about the remedy. Defendant argues that we must vacate his conviction and remand for a hearing to decide his fitness to participate in a possible retrial. The State, in turn, suggests that we can remand for a retrospective fitness hearing, in which the original expert's report is reviewed and a decision is made as to whether the defendant was fit at the time of the trial.

¶ 31 The State cites *People v. Burgess*, 176 Ill. 2d 289 (1997), and *People v. Neal*, 179 Ill. 2d 541 (1997), in which the supreme court approved the use of retrospective fitness hearings in certain circumstances. In *Burgess*, the defendant was convicted of first degree murder and

aggravated battery of a child and was sentenced to death. *Burgess*, 176 Ill. 2d at 294. The matter was appealed directly to the supreme court, which remanded the matter to the trial court for the " 'limited purpose of determining whether defendant ingested psychotropic medication at or near the time of his trial and sentencing.' " *Id.* at 299. On remand, the trial court heard evidence regarding defendant's use of psychotropic drugs. *Id*. The trial judge concluded that the drugs that defendant had taken at the time of trial "would not have had any psychotropic effect on [him] the following day," recalling that defendant had "appeared alert" at trial and had participated in the proceedings. *Id.* at 302. One of the defendant's arguments on appeal was that, because he was using psychotropic drugs at the time of his trial and sentencing hearing and he never received a hearing regarding the issue of his fitness, he was entitled to a new trial. *Id.* at 299. In contrast, the State contended that the evidence presented at the hearing on remand clearly demonstrated that the psychotropic drugs had no effect on defendant's mental condition during the original proceedings. *Id.* at 300.

¶ 32 The supreme court held that "a rule of automatic reversal is not always appropriate." *Id.* at 303. The court recognized that it was departing from earlier precedent which had "declined to make use of retrospective fitness hearings" on the basis that it would be difficult to "determin[e], long after the conclusion of the underlying proceedings, the degree of mental functioning enjoyed then by the defendant." *Id*. The court held that the testimony at the hearing on remand supported that "the defendant was suffering no impairment as a result of his ingestion of psychotropic drugs during the time of his trial and sentencing hearing." *Id.* at 304.

¶ 33 In *Neal*, the defendant, who had been sentenced to death for murder and armed robbery, filed a postconviction petition alleging that he should have received a fitness hearing, because he had been taking a psychotropic medication prior to his trial. *Neal*, 179 Ill. 2d at 542-43. The

matter proceeded to third-stage proceedings, and the trial court heard testimony regarding the nature of the medication that defendant had been taking. *Id.* at 546. The trial court denied the postconviction petition, finding that the defendant's use of the particular drug "was not proximate in time to his trial" and that "there was no scientific basis to believe that defendant was affected" by the drug. *Id.* at 547.

¶ 34 The supreme court affirmed, noting that *Burgess* had held that "a defendant who has been denied his right to a fitness hearing *** is not entitled to a new trial if evidence subsequently presented to the court in a post-trial proceeding establishes that the defendant did not, in fact, suffer any mental impairment as a result of his ingestion of psychotropic medication." *Id.* at 552. The court recognized the difficulties of holding retrospective fitness hearings more than one year after the original proceedings. *Id.* at 553. However, according to the court, the mere passage of time is not dispositive. *Id*. The court explained:

> "Consistent with the United States Supreme Court's admonition, we cannot dispute that retrospective fitness determinations will normally be inadequate to protect a defendant's due process rights when more than a year has passed since the original trial and sentencing. In exceptional cases, however, circumstances may be such that the issue of defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact. In such cases, *Burgess* will apply, and a defendant will not automatically be entitled to have his original conviction and sentence automatically set aside for a new trial." *Id.* at 553-54.

The court held that even though more than 15 years had passed since the defendant had been sentenced (*Id.* at 553), the evidence presented at the hearing on the postconviction petition established that he had not been affected by the drugs that he was taking during the original

proceedings (*Id.* at 554). The court found it significant that "[i]f the chemical properties of medication are such that their effects could accurately be assessed in light of a defendant's known medical history, as was the case here, it would not matter whether the evaluation followed the original trial and sentencing by 15 days or 15 years." *Id.*

¶ 35 Defendant argues that *Burgess* and *Neal* do not justify ordering a retrospective fitness hearing, because: nearly two years have passed since the trial was held in this case, the issue is "not so simple as the effect of medication" on defendant, there is no indication that the witnesses who will present the information in Dr. Latham's report are available, and defendant will be able to present evidence on his own behalf.

¶ 36 Nevertheless, we agree with the State that the proper remedy is to remand the cause for a retrospective fitness hearing. We find guidance in *Cook*, which, like this case, did not involve an issue of psychotropic medications. In that case, we ordered a retrospective fitness hearing under circumstances where "the parties stipulated to the only evidence presented" and the trial court was "perfectly capable of reviewing that evidence and finding whether, in light of that evidence, defendant was fit when he pleaded guilty and was sentenced." *Cook*, 2014 IL App (2d) 130545, ¶ 22. As explained above, the parties in the present case effectively stipulated that, based on Dr. Latham's report, defendant was fit to stand trial. Although the issue of defendant's fitness will be determined by a jury in this case rather than by the trial court, we see no reason to depart from *Cook*. Accordingly, we remand the cause for a retrospective determination of defendant's fitness. See *id.*

¶ 37 Defendant finally contends that he may not be assessed a second fee for DNA analysis. The State concedes that defendant provided a DNA sample in connection with a previous conviction. A defendant who has already provided a DNA sample is not required to provide

another one and may not be assessed a second fee for that purpose. *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011). Accordingly, we vacate the DNA analysis fee.

¶ 38 For the reasons explained above, the court's order granting summary judgment on the issue of defendant's fitness to stand trial is vacated. On remand, if the factfinder decides that defendant was fit at the time of trial, the conviction and judgment shall stand. If the factfinder determines that defendant was unfit at the time of trial, the conviction for public indecency shall be vacated. Since we have determined that the evidence was sufficient to convict the defendant of public indecency, there is no double jeopardy bar to retrial.

¶ 39 DNA analysis fee vacated and cause remanded with directions.