

Citation: ☀ R. v. Cooper  
2024 BCPC 80

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File No: 250498-1  
Registry: Surrey

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
Criminal Court

**REX**

v.

**THOMAS CHARLES COOPER**

**BAN ON PUBLICATION PURSUANT TO  
SECTION 486.5(1) OF THE *CRIMINAL CODE OF CANADA***

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE J. LOPES**

Counsel for the Crown:

P. Sawers

Counsel for the Defendant:

M. Shamess

Place of Hearing:

Surrey, B.C.

Dates of Hearing:

March 11 and 12, 2024

Date of Judgment:

May 15, 2024

**Introduction**

[1] Mr. Cooper is charged that on July 4, 2022, he did wilfully commit an indecent act in a public place, a mall in Surrey. On that day, two women reported that they saw Mr. Cooper's penis outside his shorts and called mall security. Mr. Cooper states that if his penis was out of his shorts, it was an accident.

**Issue**

[2] Did Mr. Cooper's genitals accidentally fall out of his shorts while he was in the mall?

**Facts Not in Dispute**

[3] On July 4, 2022, Mr. Cooper, the accused before me, was in the Guildford Town Centre mall in Surrey B.C. (the "Mall").

**Presumption of Innocence and Reasonable Doubt**

[4] The obligation is upon the Crown to prove all elements of the offence beyond a reasonable doubt. If that occurs then, and only then, can the court convict the accused. Where a reasonable doubt exists on any element of the offence charged, the accused must be acquitted. The burden of proof rests upon the prosecution throughout the trial and never shifts to the accused.

[5] Reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. Reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence.

[6] The Crown must prove more than probable guilt. However, reasonable doubt does not involve a proof to an absolute standard, since that would be an impossibly high standard. The standard of reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities. (See *R. v. Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320, and see *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144).

### The *W.D.* Formulation

[7] I must instruct myself that in a trial of criminal matters, it is not a question of which witness's evidence or version of the events I believe, but rather whether, on the totality of the evidence, Crown has proven each essential element of each offence beyond a reasonable doubt.

[8] Where there is evidence of the accused that raises a defence, as in the case in this matter, I must further instruct myself, and I must apply to this evidence the well-known process of analysis set out in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, found at para. 28.

[9] First, if I believe the evidence of the accused, obviously I must acquit. Secondly, if I do not believe the testimony of the accused, but I am left in a reasonable doubt by it, I must acquit. Third, even if I am not left in doubt on the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[10] When the Crown's case is based wholly or substantially on circumstantial evidence, a finding of guilt may only be reached where the trier of fact is satisfied beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence as a whole. See *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 20.

[11] It is important to keep in mind that circumstantial evidence is not to be assessed on a piecemeal basis. It is the evidence, assessed as a whole, that must meet the reasonable doubt standard. See *R. v. Lights*, 2020 ONCA 128, at para. 37. See also *R. v. Johnson*, 2023 ONCA 120, at para. 7.

[12] When assessing whether guilt is the only reasonable inference to be drawn from the circumstantial evidence in the case, the trier of fact must consider other plausible theories and reasonable possibilities inconsistent with guilt so long as they are grounded in logic and experience as opposed to imaginings or speculation. That said,

inferences consistent with innocence need not arise from proven facts. Rather, they may arise from a lack of evidence. See *Villaroman*, at para. 35.

[13] While Crown counsel must negate reasonable possibilities inconsistent with guilt, they need not negate every possible conjecture, no matter how irrational or fanciful, which might be consistent with an accused's innocence. See *Lights*, at para. 38. The "only reasonable inference" standard does not demand that guilt is the only possible or conceivable inference. See *R. v. Vernelus*, 2022 SCC 53.

## **Criminal Code**

### Indecent acts

173 (1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

## **Indecent Act**

[14] The Crown must establish beyond a reasonable doubt that the accused intentionally exposed his genitals in a public place in the presence of one or more persons, pursuant to s. 173(1). The Crown is not required to show that the alleged act had a sexual context (*R. v. Jacob*, 1996 CanLII 1119 (ONCA)). There is a presumption that the accused intended to show his genitals in a public place if another person saw it (*Regina v. Parsons*, 1962 CanLII 550 (BCSC), at para. 12). In other cases it has been held that while the Justice's use of the term "presumption" in this context was unfortunate, the common sense principle articulated by Wootton J. in *Parsons* is effectively that where a witness observes an accused engaging in an indecent act, one reasonable inference that may be drawn from that evidence is that the accused was engaged in that indecent act wilfully (*R. v. Novello*, 2015 ONSC 6607, at para. 9).

## **Assessment of Evidence**

[15] I can decide to accept all or part of the testimony of any witness. This involves an assessment of credibility and reliability. Credibility relates to a person's veracity or truthfulness. Reliability concerns the accuracy of the witness's testimony, which involves the consideration of the witness's ability to accurately observe, recall and recount the events in question. Even if satisfied that a witness is doing their best to be honest, the factual content of their evidence has to be tested to see if it is reliable. Once satisfied that the witness is trying to be truthful and that their account is reliable, a judge can safely conclude that their evidence is credible.

[16] There are a number of recognized factors, which are helpful in assessing the credibility and reliability of a witness's testimony. These include:

- the witness's ability to observe the events, note them in memory, recall them and describe them accurately;
- the internal consistency of the witness's account of the events;
- the external consistency of the witness's account, meaning whether the account is consistent with other evidence afforded by other witnesses, documents or physical evidence;
- the existence of prior inconsistent statements or previous occasions on which the witness has been untruthful;
- the attitude and demeanour of the witness and whether the witness answers questions in a reasonable, frank and forthright fashion without evasion, speculation or exaggeration;
- whether the witness has any interest in the trial outcome or has a motive to lie; and
- the inherent plausibility of the witness's evidence in the context of the case as a whole or, put another way, whether the witness's account makes sense or whether it seems impossible or unlikely.

## **CCTV Footage**

[17] Two video clips from the mall were entered into evidence. In the first video clip which starts at 1:12pm, Mr. Cooper is seen walking down the Mall hallway with a bag. As he approaches the bench he looks down at his crotch area. He pulls up the leg of his

shorts before sitting down. While he is seated he looks at his crotch area 4 separate times. When he stands up he looks down again. The second video clip shows Mr. Cooper walking down past the bench where he sat in the first clip at 2:11pm.

### **Evidence of J.F.**

[18] J.F. testified that she was working in a store in the Mall on July 4, 2022. She observed a man seated on a couch outside the store in the Mall hallway. She saw the man's penis outside of his shorts. J.F. testified that the man looked right at her. He had a bag with him that he moved. She was in disbelief about what she had seen and went to get a co-worker. She and the co-worker, Ms. C., saw the man again about 30 minutes later. She saw the man on a different couch in the Mall hallway, this one was to the right of the store. His penis was outside of his shorts again. After this, she and Ms. C. called security.

[19] J.F. was cross-examined about her observations. She did not agree that the crotch of the shorts could have just shifted. She admitted that she did not know if the seam moved or the genitals. She did not see the man touch his genitals. She maintained that the man looked at her, but conceded that she did not know what was in the man's thoughts.

### **Evidence of Ms. C.**

[20] Ms. C. was working in a store in the Mall on July 4, 2022. J.F. and Ms. C. were together when J.F. pointed out a man to her in the Mall. The man was looking around and exposed himself to them. He was wearing short shorts and he had a bag. He moved the bag, opened his legs, and his penis and testicles fell out of his shorts. She described the man as looking in their direction, but she did not make eye contact with him. He got up after exposing himself. She and J.F. called Mall security immediately. Ms. C. described how she was shocked and uncomfortable after seeing this.

[21] Ms. C. agreed in cross-examination that she believed he did it deliberately, but it was possible that the exposure was accidental.

**Evidence of Mr. Cooper**

[22] Mr. Cooper testified that he is 53 years old, married, and the owner/operator of a bowling alley. On July 4, 2022, he was at work in the morning and then planned to start an exercise regime. First he decided to go the Mall to buy a DVD. He was wearing shorts with underwear and before he went into the Mall, he changed out of the shorts he was wearing into new shorts he had bought to exercise in. He changed in his vehicle in the Mall parking lot. He then went into the Mall. He did not find the DVD he was looking for as it had not been released yet. He decided to buy lottery tickets and walk in the Mall for exercise. He stayed in the Mall for about two hours. He testified that he did not have a specific recollection of stopping to sit as he is seen doing in the video.

[23] Mr. Cooper first denied making eye contact with J.F. and then stated it was possible that he did. He testified that he did not know his genitals were exposed. He testified that he did not intentionally expose his genitals. Mr. Cooper testified that the witnesses must have seen his exposed genitals as they testified to, as he did not think they would lie to the court.

[24] Mr. Cooper's demeanour demonstrably changed once he was under cross-examination. In his evidence in chief summarized previously, he was confident and answered questions easily. Under cross-examination, Mr. Cooper's voice dropped to the point that he had to be reminded to speak clearly several times. Mr. Cooper's evidence in chief appeared to be rehearsed as compared to his evidence in cross-examination.

[25] Mr. Cooper testified that he changed to go to the park to go exercising. He agreed that it was possible that he made eye contact with the two complainants. He testified that the shorts he changed into had a mesh liner like boxer shorts inside the shorts. He confirmed that he was wearing underwear and cargo shorts before changing into his exercise shorts. For the first time in cross-examination he testified that his boxers bunched up when he tried on the exercise shorts so he took his boxer shorts off and wore the new shorts without underwear. He testified that he stripped naked waist down in his vehicle in the Mall parking lot as there was no one around. Mr. Cooper also

put on a mask and he testified that he was concerned about catching Covid. When questioned as to why he changed his plan to walk outside in a park to inside in the Mall where he was concerned about Covid, Mr. Cooper stated that there were not that many people in the Mall.

[26] In his evidence in chief he stated that he walked around the Mall “where the wind blew”. In cross he testified about specific stores he went to and how many times he went to the lottery kiosk. He also testified in cross to the specific movie he was looking for, for the first time.

[27] Mr. Cooper was asked about his actions as seen in the video. He would not agree that he adjusted his shorts. He agreed he was looking down. He stated that he was grabbing his jacket. When shown the video he agreed he hiked his shorts up when he sat down. When asked if he was looking at his crotch area, he mumbled about looking at his phone. He was asked again about looking at his crotch and said he did, but he was not looking for anything.

### **Position of the Parties**

[28] The Crown submits that it has been proven beyond a reasonable doubt that Mr. Cooper intentionally exposed his penis in the Mall. They submit that the video evidence is supportive and illustrative of the exposure. They submit that Mr. Cooper should not be believed as his evidence was inconsistent.

[29] Mr. Cooper submits that the Crown has not proven that he wilfully exposed himself and that if he was exposed, it was an accident. Both incidents were an accident.

### **Analysis**

[30] I do not believe Mr. Cooper and his evidence does not raise a reasonable doubt. Mr. Cooper’s evidence appeared to be rehearsed in that he was confident and clear in chief, but under cross-examination, his demeanour changed. He became unclear, came up with new details, and mumbled uncertain answers.



[31] His evidence regarding anticipatorily changing from shorts and underwear into other shorts with no underwear in the parking lot of the Mall for a walk in the park he did not do, sounded fanciful.

[32] He stated that he was so concerned about Covid in July of 2022 that he masked before going into the Mall. His evidence is that he then spends approximately two hours wandering the Mall, sitting on couches with other people, and abandoning his plan to go for a walk in the park. From the video, one can see that there are many people in the Mall that day contrary to his evidence. This rationalization of his time in the Mall is not believable.

[33] Mr. Cooper's evidence was unreliable. At first he testified that he had no idea of the route he took in the Mall. Then he supplied specific stores. He stated that he walked in the Mall for exercise, yet the video shows him casually walking back and forth around the area of the store where the two complainants were working. Further, he is sitting for a period of time in the video.

[34] When confronted with the video evidence, Mr. Cooper tried to explain that he was looking at his jacket or his phone. It was clear that he was attempting to provide an explanation for looking at his crotch area when in fact he did not know and had no memory of looking at his jacket or phone at that particular time. He had first testified that he did not recall sitting down at the Mall, but when questioned about his actions in the video, he started to make up what he thought he might have been doing.

[35] I find that on the totality of the evidence, Mr. Cooper was not forthright. Nor was he credible or reliable. I do not believe him and his evidence does not raise a reasonable doubt.

[36] The evidence that I do accept is as follows. I accept the evidence of J.F. that she saw Mr. Cooper's penis and that he looked at her. There were some minor discrepancies in her evidence compared to what was in the video evidence, but overall the video is corroborative of her evidence. The minor inconsistencies of the bag movement do not diminish her evidence on the essential facts. J.F. was obviously

traumatized by this event and did her best with the police and the court to provide the information. She was credible and reliable on the fact that the exposure occurred.

[37] I accept the evidence of Ms. C. that she saw Mr. Cooper's genitals. Ms. C. was a forthright witness who readily admitted that she could not guess as to what was in the man's mind, but described that she felt that it was a deliberate exposure. She was not shaken on the fact she saw his genitals.

[38] In fact, Mr. Cooper himself in his evidence, accepted that if the witnesses say they saw him exposed there was no reason to disbelieve them.

[39] The issue is whether the Crown has proven beyond a reasonable doubt that Mr. Cooper's genitals did not accidentally fall out of his shorts both times that the witnesses saw them.

[40] I find that Mr. Cooper changed shorts in the Mall parking lot to facilitate the indecent exposure. There is no other reasonable inference in light of the totality of the evidence.

[41] On the evidence that I do accept on the first instance: J.F. saw the man look at her and saw his penis outside of his shorts in conjunction with the video evidence of Mr. Cooper manipulating his shorts before sitting down and then glancing down to his crotch area multiple times in between looking around the Mall. I find that Mr. Cooper deliberately exposed his penis in public.

[42] On the second instance, I find that the two witnesses corroborate and are consistent with each other. I find it implausible that Mr. Cooper returned to the same area and a second accidental exposure occurred. On the totality of the evidence that I do accept, it is not a reasonable inference that I can draw that Mr. Cooper was unaware of the exposure of his genitals as they accidentally fell out not once, but twice from shorts with a net liner. I do not accept his evidence that it was an accident and he did not know his genitals were exposed. The second instance is proven on the evidence of J.F. and Ms. C. as to what they saw and I accept their evidence as they are both credible and reliable witnesses.

[43] On the totality of the evidence, I find that the Crown has proven beyond a reasonable doubt that Mr. Cooper wilfully exposed his genitals twice in the Mall on July 4, 2022. I do not accept Mr. Cooper's submission that it was an accident and I find that accidental exposure is not a reasonable inference on the totality of the evidence that I do accept.

### **Conclusion**

[44] I find the accused, Mr. Cooper, guilty of indecent exposure.

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The Honourable Judge J. Lopes  
Provincial Court of British Columbia