



Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SEPTEMBER TERM, 2026

State of Vermont v. Gregory Foley*	}	APPEALED FROM:
	}	Superior Court, Lamoille Unit,
	}	Criminal Division
	}	CASE NO. 22-CR-06902
		Trial Judge: Mary L. Morrissey

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction for “open and gross lewdness and lascivious behavior” in violation of 13 V.S.A. § 2601. He argues that the criminal division erred in denying his motion for a judgment of acquittal because the State failed to prove that he engaged in lascivious behavior. We affirm.

The State presented the following evidence at trial. In June 2022, defendant lived in an apartment across an alley from a restaurant. Defendant’s deck was visible from a large window in the restaurant. On the evening in question, two of the State’s witnesses—one of whom was then seventeen—were working in the restaurant. Both witnesses were familiar with defendant. At all relevant times, it was still light outside and the lights were on inside the restaurant.

At approximately 7 p.m., one of the witnesses saw defendant through the restaurant window. He was standing on his deck, naked from the waist down, stroking his penis with his hand. As a result, the other witness placed her phone in the restaurant window and set it to record video. Defendant then came into the restaurant to order food, but was not able to do so because it was closing. He subsequently returned to his deck—again not wearing pants or underwear—lifted up his shirt, and began to “fondle” his penis for approximately ten seconds. He faced the restaurant window as he did so. Both witnesses saw this, and both felt uncomfortable. This second incident was captured on the witness’s phone and the footage was played for the jury at trial. It shows defendant’s body and face turned in the direction of the window while he touched himself.

One of the witnesses reported this to the restaurant owner, and police were called. A trooper came to the restaurant that night, spoke with the witnesses and owner, and viewed the phone video. The trooper attempted to speak with defendant, but he did not answer his door. The trooper returned the following day and was able to talk to defendant. The interaction was

captured on the trooper's body-worn camera and played for the jury. During that conversation, defendant described seeing two people looking at him from the restaurant window the night before, after his unsuccessful attempt to order food there. Defendant denied, however, that his penis was exposed, that he had his hand on his penis, or that he was masturbating at any point. The officer then told defendant that one of the restaurant workers had recorded him doing so. Defendant replied that he did not remember this happening and noted that he sometimes sleepwalks.

After the close of the State's evidence, defendant moved for a judgment of acquittal. He argued that the State failed to show that his behavior was lascivious. The court denied the motion.

Defendant then testified. He offered various explanations for the conduct seen in the video, including that he was: birding; monitoring a nearby dumpster for unauthorized use; attempting to see whether the restaurant had customers because he was worried about its success; trying to ensure that his car was not keyed; heard rocks being thrown at his roof; was not wearing pants in order to air out his genital area; had chafing in his genital area and may have been rubbing creams into the area to treat that condition; and was attempting to free his penis from what he later learned was a hernia that was "almost engulfing" it. Defendant also testified that he was physically unable to masturbate, did not have an erection at any time during the incident, and got no "sexual enjoyment" out of having his hand on his penis.

After deliberation, the jury found defendant guilty of open and gross lewd and lascivious conduct. Defendant filed a renewed motion for a judgment of acquittal, which the court denied. This appeal followed.

We review the denial of a motion for judgment of acquittal based on a claim of insufficient evidence de novo, applying the same standard as the trial court. State v. Stephens, 2020 VT 87, ¶ 10, 213 Vt. 253; State v. McMahon, 2024 VT 67, ¶ 7, 220 Vt. 180. Accordingly, we consider whether the evidence, viewed in the light most favorable to the State and excluding any modifying evidence, is sufficient to fairly convince a factfinder that the defendant is guilty beyond a reasonable doubt. McMahon, 2024 VT 67, ¶ 7. In doing so, we bear in mind that a jury "may draw rational inferences from the circumstantial evidence to determine whether disputed ultimate facts occurred." State v. Lovejoy, 2026 VT 26, ¶ 8 (quotation omitted). "The evidence and inferences, however, must add up to more than mere suspicion; the jury cannot bridge evidentiary gaps with speculation." State v. Durenleau, 163 Vt. 8, 12-13 (1994).

"By design, this standard largely defers to the important role of juries in our judicial system." State v. Jones, 2019 VT 3, ¶ 12, 209 Vt. 370. "Though the evidence may be amenable to multiple interpretations, not all of which point towards guilt, it is not our role to second-guess the interpretations of the jury." State v. Vaillancourt, 2025 VT 20, ¶ 17, 221 Vt. 39 (quotation omitted). Thus, a court may grant a judgment of acquittal—thereby removing the case from a jury's consideration—only "when there is no evidence to support a guilty verdict." Jones, 2019 VT 3, ¶ 12, (quotation omitted) (emphasis added).

Here, defendant argues that the State failed to admit evidence showing that he engaged in "lascivious behavior," as necessary to sustain a conviction under 13 V.S.A. § 2601. See State v. Anderkin, 145 Vt. 240, 243 (1984) ("In a criminal trial, the State is required to prove beyond a reasonable doubt each element of the alleged offense.").

As we have recognized, § 2601 does not define “lewdness” or “lascivious behavior,” and “we have historically declined to give these terms a precise definition ourselves.” In re A.P., 2020 VT 86, ¶ 18, 213 Vt. 291 (quotation omitted). “Rather, we defer to the common sense of the community, and, in turn, the members of the jury, to define open and gross lewd and lascivious conduct in each particular case.” State v. Discola, 2018 VT 7, ¶ 20, 207 Vt. 216 (quotation omitted). This does not mean, however, that our case law offers no guidance. We have explained that the word “lascivious” is to be given its commonly accepted meaning, which includes “tending to excite lust” and “filled with or showing sexual desire.” In re A.P., 2020 VT 86, ¶ 19 (quotation omitted). Thus, we held in In re A.P. that “lewdness is sexualized behavior that is shocking or repulsive to the community, while lasciviousness connotes sexual desire or lust.” Id. ¶ 20 (concluding that “[w]hile these definitions are broad and there is some overlap between them, they are not identical and are sufficiently definite to give notice of what behavior is proscribed”). Moreover, in response to a challenge to a statute “very similar” to § 2601, we “identif[ied] factors which rendered the defendant’s conduct ‘lascivious . . . beyond question’ ”: his “intentional public exposure of himself, ‘with a view to excite unchaste feelings and passions . . . calculated to outrage the feelings of the person, to whom he thus exposed himself.’ ” State v. Purvis, 146 Vt. 441, 442-43 (1985) (quoting State v. Millard, 18 Vt. 574, 577-78 (1846)); see In re A.P., 2020 VT 86, ¶ 20 (citing Millard, 18 Vt. at 577).

Defendant, however, argues that the State failed to prove that his behavior was lascivious—in other words, connoting sexual desire or lust—because it did not show that his penis was erect while he was touching it. Though the State counters that the evidence could support a finding that defendant’s penis was erect, we need not address this issue. Regardless of whether the evidence demonstrated that defendant’s penis was erect, it was sufficient to support the jury’s conclusion that defendant’s behavior was lascivious.*

Defendant’s argument is similar to one we considered in State v. Ovitt, 148 Vt. 398 (1986). In that case, a witness testified that she saw the defendant masturbating while he stood across the road from her residence. On appeal, the defendant argued that his conviction for open and gross lewd and lascivious behavior under 13 V.S.A. § 2601 could not stand because the State failed to prove that he in fact exposed his genitals to the witness. We explained that this was not an element of the offense. Ovitt, 148 Vt. at 404. The witness had testified that the defendant had his shirt unbuttoned and rolled back so that she could see his stomach and thighs, he was outdoors in plain view, was masturbating, and pivoted as she passed by to remain in full view. Id. Given this evidence, we held, “the State did not need to also prove that defendant actually exposed his genitals, or present evidence that the complaining witness actually saw defendant’s genitals,” because she testified to “conduct which a trier of fact may determine to be lewd and lascivious.” Id. at 404-05.

Here, the witnesses testified—and the cell-phone video showed—that defendant, naked from the waist down, turned his body in the direction of the restaurant window while standing on his porch in full view and then fondled or stroked his penis, making the witnesses uncomfortable.

* We note that defendant’s alternate explanations for his actions on the deck are modifying evidence—“exculpatory evidence introduced by [the] defendant, such as countervailing testimony.” State v. Gibney, 2003 VT 26, ¶ 14, 175 Vt. 180. As a result, those explanations are not appropriately considered in our analysis, which “requires us to determine only whether the State’s evidence, taken in the light most favorable to the State and excluding any modifying evidence, sufficiently and fairly supports a finding of guilt beyond a reasonable doubt.” Id.

Regardless of whether the evidence supported a finding that defendant's penis was erect, the jury could reasonably infer that his behavior was lascivious.

Defendant also points out that there was no evidence that, during the time he was on his deck, he touched, attempted to touch, or spoke with another person. His comparisons to the evidence in other cases involving convictions under § 2601 do not support this argument. Each case must be evaluated “based on its own facts and circumstances, and a judgment of acquittal is proper only if the prosecution has failed to put forth any evidence to substantiate a jury verdict.” State v. Couture, 169 Vt. 222, 226 (1999). As we explained in Ovitt—a case that, as set forth above, did not involve evidence of the defendant attempting to touch or speak to the complaining witness—“indecent exposure and public masturbation have been deemed to be proscribed by statutes prohibiting open and gross lewd and lascivious behavior.” 148 Vt. at 404. Just as the State did not need to prove that defendant was erect while touching himself on the deck in order to support a conviction, it did not need to prove that he touched, attempted to touch, or spoke to the restaurant workers at that time. Id.; Millard, 18 Vt. at 577.

The criminal division did not err in denying defendant's motion for judgment of acquittal.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Christina E. Nolan, Associate Justice