

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS LLOYD LEEK,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2021

No. 353034

Oakland Circuit Court

LC No. 2019-271100-FH

Before: STEPHENS, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals, as of right, his bench trial conviction of aggravated indecent exposure, MCL 750.335a(2)(b). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 270 days' in jail, and 60 months' probation. We affirm.

I. BACKGROUND

This case arises out of an incident that occurred in the men's locker room at Franklin Athletic Club in Southfield, Michigan. Club member RS was taking a shower in the men's locker room when he was startled by the approach of defendant, who walked up to him and stood a few inches away from him. Defendant asked RS if he was using a dirty towel on the floor in front of RS's shower stall, and RS replied that he was not. A few moments later, RS observed defendant, in a nearby shower masturbating. RS reported the incident to both the Franklin Athletic Club management and the Southfield Police. The club terminated defendant's membership within days of the incident and defendant was arrested several months later.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his conviction should be reversed because the prosecution failed to present sufficient evidence to support defendant's conviction of aggravated indecent exposure.<sup>1</sup> We disagree.

#### A. STANDARD OF REVIEW

In reviewing a challenge to the sufficiency of the evidence at a bench trial, this Court must “view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991), citing *People v Jackson*, 178 Mich App 62, 64; 443 NW2d 423 (1989).

#### B. ANALYSIS

Under MCL 750.335a, “[a] person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.” MCL 750.335a. Indecent exposure is “the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others.” *People v Huffman*, 266 Mich App 354, 369; 702 NW2d 621 (2005), quoting *People v Kratz*, 230 Mich. 334, 337; 203 NW 114 (1925). In addition to indecent exposure, Michigan also recognizes aggravated indecent exposure, which involves indecent exposure with the added element of fondling the person’s “genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1).” MCL 750.335a(2)(b).

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<sup>1</sup> Defendant argues for the first time in his appellate reply brief that the evidence of additional complaints about defendant by other members of Franklin Athletic Club is inadmissible. Defendant claims that the evidence of these additional complaints is irrelevant hearsay under MRE 801, and inadmissible under MRE 403 because its probative value is outweighed by its prejudicial effect. He further argues that the evidence of additional complaints violates MRE 404(b) because it was introduced to show that defendant has a propensity for wrongdoing and that he acted in accordance with that propensity on this occasion. We will not consider these arguments. “Reply briefs must be confined to rebuttal of the arguments in the appellee’s or cross-appellee’s brief.” MCR 7.212(G). Parties may not raise new issues in a reply brief. *People v Batten*, 9 Mich App 195, 203; 156 NW2d 640 (1967).

Defendant also cursorily argues that his sentence is improper because aggravated indecent exposure, while generally treated as a felony, is statutorily classified as a misdemeanor that carries a possibility of two years’ probation rather than 6 years’ probation. We will not consider this argument because it has been abandoned. In Michigan, failure to support a contention on appeal constitutes an abandonment of that issue. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Defendant did not include his sentencing argument in the statement of the issue presented, did not discuss it in his brief on appeal, and did not provide any caselaw supporting his claim that his sentence was improper. Defendant also failed to provide the sentencing transcript. Defendant has therefore abandoned the argument and we decline to review it.

There was sufficient evidence introduced at trial to sustain defendant's conviction. The trial court made a credibility determination and found the complainant's version of the underlying facts sufficiently persuasive to meet the criminal burden of proof. The court made factual findings that the defendant first exposed and then fondled his genitalia in RS's presence for the purpose of sexual gratification. Thus, MCL 750.335a(1) was proven beyond a reasonable doubt. Defendant's exposure of his penis certainly qualifies as "the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." *Huffman*, 266 Mich App at 369. RS testified and the trial court found that defendant purposefully approached RS while RS was showering, then chose the shower stall closest to RS despite the fact that no other men were present in the shower area. The trial court reasonably concluded that these facts suggest defendant intentionally and knowingly made an open and indecent exposure of his penis in violation of MCL 750.335a(1).

We reject defendant's argument which is made without caselaw support, that there is a requirement that the conduct underlying aggravated indecent exposure occur over a certain temporal period. The credibility determination rests with the fact-finder, and we must defer to the fact-finder's conclusion. *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018). In this case, the trial court found RS's testimony that defendant was masturbating to be credible in light of the evidence presented. Viewing the evidence in the light most favorable to the prosecution, *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991), the trial court's conclusion that the prosecution had proved the elements of aggravated indecent exposure beyond a reasonable doubt was on the basis of sufficient evidence.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Riordan