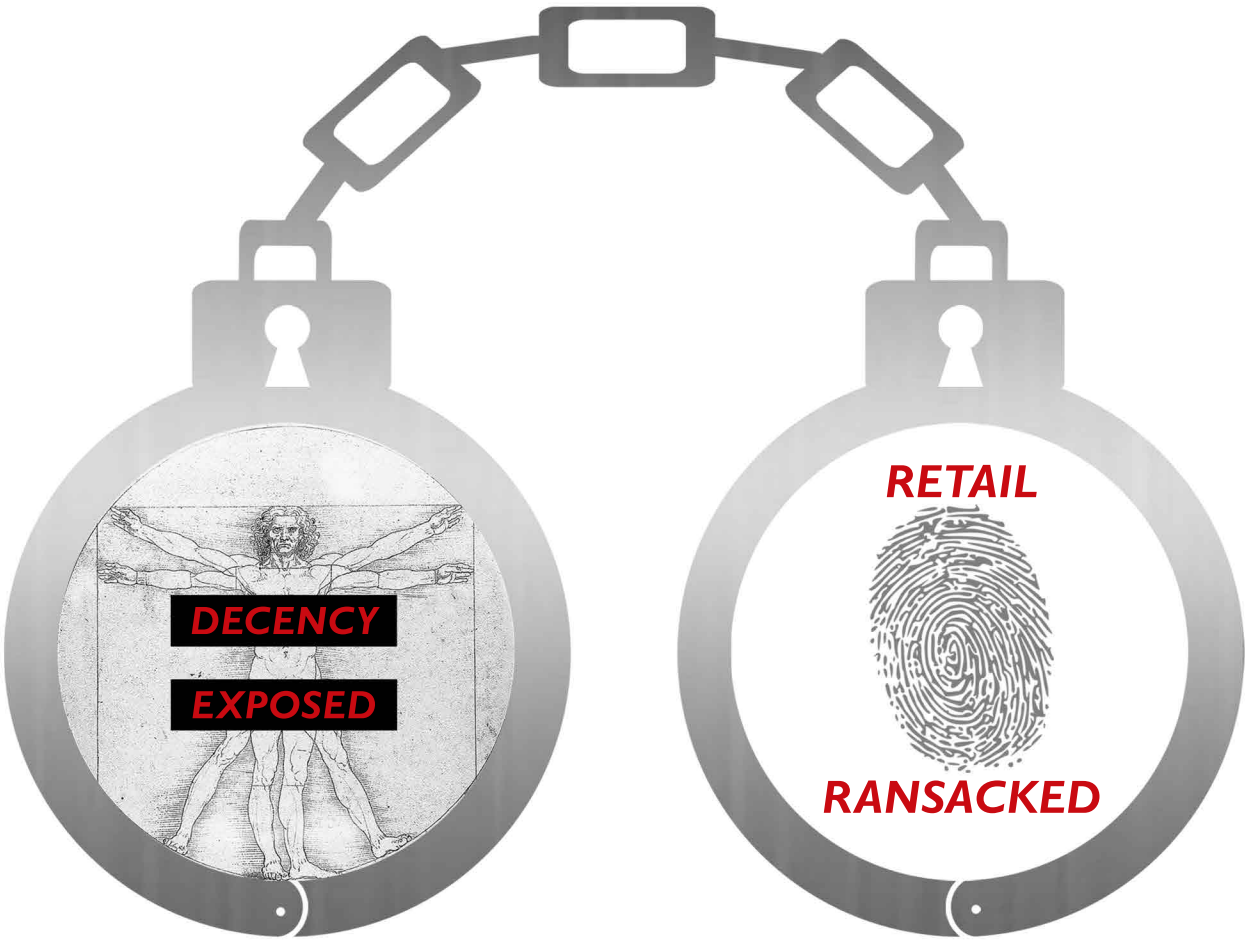
Fashion Police

Retail Ransacked: Theft on the Rise
&
Decency Exposed: The New Culture Wars



Thursday, September 8, 2022

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FASHION POLICE

Retail Ransacked: Theft on the Rise
&
Decency Exposed: The New Culture Wars

September 8, 2022
9:00AM - 11:45AM

Fordham Law School
150 W. 62 Street
New York, NY 10023

9-10:15AM **Retail Ransacked: Theft on the Rise**

Matthew Bauer, Madison Avenue Business Improvement District
Christopher Hornig, Saks Off Fifth
Estelle Strykers-Santiago, New York County District Attorney's Office
Ashley Valdes, Warby Parker
MODERATOR: **Professor Susan Scafidi,**
Fashion Law Institute at Fordham

10:30-11:45AM **Decency Exposed: The New Culture Wars**

Marilee Holmes, Save the Children
Professor Kimberly Jenkins,
The Fashion and Race Database and Artis Solomon Consulting
Professor Susan Scafidi, Fashion Law Institute at Fordham
MODERATOR: **Jeff Trexler**, Comic Book Legal Defense Fund

FASHION LAW INSTITUTE®

FASHION POLICE

Retail Ransacked: Theft on the Rise
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Decency Exposed: The New Culture Wars

Program Description

We're not the fashion police — though we're asked that question quite often! — but we are keeping a close watch on current developments involving fashion and policing. Join us on the eve of New York Fashion Week for FASHION POLICE, a double-header symposium in partnership with the Comic Book Legal Defense Fund. The first panel, "Retail Ransacked: Theft on the Rise," will address this growing trend, its causes and effects, and strategies and public/private initiatives to combat it. In case you missed our popular event at San Diego Comic Con, we'll reprise it with our second panel, "Decency Exposed: The New Culture Wars," an exploration of obscenity, decency, and current regulation of what we do or don't wear. We look forward to welcoming you back to campus for the first time since the start of the pandemic! Dress code: Clothed, please.

SPEAKERS' BIOGRAPHIES

Retail Ransacked: Theft on the Rise

MATTHEW BAUER

President, Madison Avenue Business Improvement District

Matthew Bauer joined the Madison Avenue Business Improvement District (BID) as its President in 1999. The BID provides marketing, supplemental safety and sanitation services, and streetscape improvements for the businesses located on Madison Avenue on the Upper East Side, one of the world's leading luxury shopping, art & hospitality destinations. The US Department of Commerce, the International Downtown Association, the NYC Department of Small Business Services and the Shop America Alliance have all recognized the marketing-related programming of the Madison Avenue BID, a not-for-profit, public/private partnership.

Bauer has previously served as the Executive Director of the Lower East Side BID, the NYC Circuit Rider of the New York Main Street Alliance, a planner with the NYC Department of City Planning, and as an Adjunct Associate Professor of Architecture, Planning and Preservation at Columbia University.

Bauer is treasurer of Skal International New York, a member of the Retail Committee of NYC & Company and treasurer of the NYC BID Association. He previously served as Chair of the Association.

Bauer earned a Ph.D. in Planning & Public Policy from Rutgers University, and holds Master's Degrees in Historic Preservation and Urban Planning from Columbia University.

CHRISTOPHER HORNIG

VP, Assistant General Counsel, Saks Off Fifth

Chris Hornig is Vice President, Assistant General Counsel for Saks OFF 5TH, where he manages a wide range of legal matters for OFF 5TH's e-commerce business. Chris previously handled litigation matters for OFF 5TH, Saks Fifth Avenue, and their parent company, Hudson's Bay Company. Before going in-house Chris was a litigation associate at Sullivan & Cromwell in New York. Chris attended law school at the University of Texas at Austin and Middlebury College as an undergraduate.

ESTELLE STRYKERS-SANTIAGO

Director, Community Partnerships Unit, New York County District Attorney's Office

Estelle Strykers-Santiago is the Director of the Community Partnerships Unit (CPU) at the Office of Manhattan District Attorney Alvin L. Bragg Jr. Estelle leads a mission driven team that builds trust with communities served by the DA's Office, raises awareness about community safety issues, ensures Manhattan communities have access to the office, and creates partnerships that prevent crime. One current focus of Estelle and the CPU team is the Manhattan Small Business Alliance, a comprehensive plan developed by DA Bragg to help combat retail theft in Manhattan.

Estelle has served in various roles during her thirty years at the DA's Office. She was Supervisor of the Witness Aid Services Unit, Administrator in the Frauds Bureau, and Special Assistant to the Executive ADA for Crime Strategies where she assisted in the development and implementation of a more strategic community engagement approach. In that role, she also led the creation and implementation of the Saturday Night Lights initiative, a youth violence prevention program which was awarded the *2013 United States Attorney General's Award for Outstanding Contributions to Community Partnerships for Public Safety,* and now runs in all five boroughs. Prior to the DA's Office, Estelle worked with unhoused young adults at Covenant House NY.

ASHLEY VALDES

Principal Counsel, Warby Parker

Ashley Valdes is Principal Counsel at Warby Parker, a direct to consumer eyewear company providing a full spectrum of vision services and high quality designer glasses. At Warby Parker, Ashley is responsible for reviewing and advising on the company's branding and marketing strategies, commercial contracts, and IP portfolio. Prior to joining Warby Parker, Ashley was an Associate with Hand, Baldachin & Associates LLP, a boutique firm which provided counsel to a variety of fashion, lifestyle and tech clients. Ashley graduated with a JD from Fordham Law School in 2016 with a concentration in Intellectual Property and Information law and has returned as an adjunct professor, teaching Fashion Retail Law.

Decency Exposed: The New Culture Wars

MARILEE HOLMES

Senior Director, Diversity, Inclusion, and Belonging, Save the Children

Marilee Holmes is Lead Advisor for Diversity, Inclusion and Belonging at Save the Children, the leading international humanitarian organization focusing on the health, education and safety of children globally. Prior to Save the Children, Marilee was Chief of Staff at Roc Nation where she was the CEO's right hand on all Roc Nation platforms and business needs. Marilee joined Roc Nation following her tenure at Wilhelmina Models, where she was VP of Operations and General Counsel, leading all legal and business efforts across the company. Before going in-house at Wilhelmina, Marilee spent over a decade at large, global law firms in Atlanta and NYC as an immigration attorney. Marilee is a graduate of Vanderbilt University Law School and the University of Michigan.

PROFESSOR KIMBERLY JENKINS

Founder, The Fashion and Race Database and Artis Solomon Consulting

Based in New York with a background in cultural anthropology and art history, Kimberly M. Jenkins currently holds a position as Assistant Professor of Fashion Studies at “X University” (formerly Ryerson University) in Toronto, Canada, having formerly taught at Parsons School of Design and Pratt Institute in New York for seven years. Kim is best known for creating the course, Fashion and Race, at Parsons and for working as an education consultant for Gucci (Milan and Hong Kong) to support their efforts on cultural awareness. In 2021, Kim opened a formal consultancy called Artis Solomon, which provides bespoke research and insight about fashion history and theory.

In 2017, Kim developed an institutionally-funded digital humanities project called *The Fashion and Race Database,* and turned it into an independent global learning platform in 2021. She curated her first exhibition, *Fashion and Race: Deconstructing Ideas, Reconstructing Identities* at the Arnold & Sheila Aronson Gallery at Parsons School of Design in 2018, and in May 2020, the *Fashion and Race* exhibition returned in permanent, virtual form on the Google Arts & Culture platform. In 2020, she co-curated the exhibition, *Rainbow Shoe Repair: An Unexpected Theater of Flyness* at the Abrons Art Center.

In addition to teaching her own courses, Kim has hosted engaging events at The New School, and has presented guest lectures and spoken on panels at Harvard University, The Fashion Institute of Technology, Aalto University, Parsons School of Design in Paris, UCLA, Loyola University, Georgetown University, Queen’s University, Seton Hall University, Columbia University, the Museum of Fine Arts Boston, the Metropolitan Museum of Art, the Cummer Museum, and the Brooklyn Museum of Art.

Her work in the classroom has also crossed over into think tanks and public forums, being invited to speak at SXSW, Google HQ, the Brooklyn Public Library and WGBH Boston's live show, *The Curiosity Desk*. Kim also facilitates a traveling lecture series called 'The Fashion & Justice Workshop' with her dear friend and collaborator, Dr. Jonathan M. Square (Harvard University, The New School).

Kim's expertise has been called upon by numerous websites and publications, including *Vogue Business*, *The Business of Fashion*, *The Financial Times*, *The Wall Street Journal*, *The New York Times* and *W* magazine. Her work as an educator has been profiled by *Vogue*, *The Guardian*, *DAZED*, *i-D*, *The Washington Post*, *NYLON*, *The Saturday Paper*, Refinery29, Fashionista, *CR*, *GRAZIA* and The Root (among others). Her academic research and writing has been published in *FOAM*, *QED: A Journal in GLBTQ Worldmaking*, *International Journal of Fashion Studies*, *The Fashion Studies Journal*, *Art Jewelry Forum* and she sits on various advisory boards in the art and fashion community.

Kim was born in Detroit, Michigan and raised in Trophy Club, Texas. Amongst her favorite hobbies, she enjoys vintage shopping and collects Bonnie Cashin pieces.

PROFESSOR SUSAN SCAFIDI

Founder and Director, Fashion Law Institute at Fordham

Susan Scafidi is the first professor ever to offer a course in Fashion Law, and she is internationally recognized for her leadership in establishing the field. She has testified regarding the proposed extension of legal protection to fashion designs and continues to work actively with members of the U.S. Congress and the fashion industry on this and other issues. Her additional areas of expertise encompass property, intellectual property, cultural property, international law, and legal history.

Professor Scafidi founded and directs the Fashion Law Institute, the world's first center dedicated to the law and business of fashion. A nonprofit organization headquartered at Fordham Law School, the Fashion Law Institute was established with the generous support and advice of the Council of Fashion Designers of America and its then-president, Diane von Furstenberg. Prior to teaching at Fordham, Professor Scafidi was a tenured member of both the law and history faculties at SMU, and she has taught at a number of other schools, including Yale, Georgetown, and Cardozo. After graduating from Duke University and the Yale Law School, she pursued graduate study in legal history at Berkeley and the University of Chicago and clerked for a distinguished legal historian, Judge Morris S. Arnold of the Eighth Circuit Court of Appeals.

Professor Scafidi is the author of Who Owns Culture? Appropriation and Authenticity in American Law, as well as articles in the areas of intellectual property, cultural property, and of course fashion law. She is currently writing a book to be published by Yale University Press. In addition, she has spoken to legal, design, and academic audiences

around the globe and has contributed commentary to hundreds of media reports on issues related to law and the fashion industry. Professor Scafidi also created the first website on fashion law, Counterfeit Chic, which was recognized as one of the American Bar Association's top 100 blogs.

MODERATOR:
JEFF TREXLER

Interim Director, Comic Book Legal Defense Fund

Jeff Trexler teaches the Fashion Ethics, Sustainability, and Development course at Fordham Law School. He is an attorney and consultant whose clients include fashion brands, comics creators, entertainment companies, nonprofits, and social ventures. He has worked on issues ranging from tax exemption and ethics compliance to intellectual property and anti-censorship, including the successful defense of Maia Kobabe's graphic novel *Gender Queer* against obscenity charges in a landmark First Amendment case.

Trexler previously served as a chaired professor and executive director of the Wilson Center for Social Entrepreneurship at Pace University and taught nonprofit organizations at Yale, SMU and Saint Louis University. Trexler holds a J.D. from Yale Law School and a Ph.D. in American Religious History from Duke University.

SELECTED READINGS

SELECTED READINGS

Retail Ransacked: Theft on the Rise

Bail reform

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Chelsia Rose Marcius, Shoplifting Ring Swept Stores for Luxury Goods, Prosecutors Say, NEW YORK TIMES, May 26, 2022, https://www.nytimes.com/2022/05/26/nyregion/nyc-shoplifting-ring.html.

Tina Moore and Ben Kesslen, *Alleged NYC Serial Shoplifter Lorenzo McLucas Busted for 129th Time – Weeks After Release Due to Bail Reform*, NEW YORK POST, July 14, 2022, https://nypost.com/2022/07/14/nyc-serial-shoplifter-lorenzo-mclucas-busted-for-129th-time/amp/.

New York City Police Department, *Career and Violent Criminals are Exploiting New York's Criminal Justice System*, August 3, 2022, https://www1.nyc.gov/site/nypd/news/p00055/career-violent-criminals-exploiting-new-york-s-criminal-justice-system.

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Decency Exposed: The New Culture Wars

Statutes and standards

47 U.S.C. § 230, *Protection for Private Blocking and Screening of Offensive Material*, https://www.law.cornell.edu/uscode/text/47/230 (attached).

New York Penal Law § 245.00 *et seq.*, *Offenses Against Public Sensibilities*, https://codes.findlaw.com/ny/penal-law/pen-sect-245-00.html (attached).

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Sara MacNeil, *After Shooting of Black Man, Louisiana City Votes to End Sagging Pants Law*, SHREVEPORT TIMES, June 12, 2019, https://www.shreveporttimes.com/story/news/nation/2019/06/12/shreveport-louisiana-saggy-pants-law/1429817001/.

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47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

New York Penal Law § 245

Offenses Against Public Sensibilities

§ 245.00 Public lewdness

A person is guilty of public lewdness when he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act: (a) in a public place, or (b) (i) in private premises under circumstances in which he or she may readily be observed from either a public place or from other private premises, and with intent that he or she be so observed, or (ii) while trespassing, as defined in section 140.05 of this part, in a dwelling as defined in subdivision three of section 140.00 of this part, under circumstances in which he or she is observed by a lawful occupant.

Public lewdness is a class B misdemeanor.

§ 245.01 Exposure of a person

A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

Exposure of a person is a violation.

Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting exposure of a person as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.

§ 245.02 Promoting the exposure of a person

A person is guilty of promoting the exposure of a person when he knowingly conducts, maintains, owns, manages, operates or furnishes any public premise or place where a person in a public place appears in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

Promoting the exposure of a person is a violation.

Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting the exposure of a person substantially as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.

§ 245.03 Public lewdness in the first degree

A person is guilty of public lewdness in the first degree when:

1. being nineteen years of age or older and intending to be observed by a person less than sixteen years of age in a place described in subdivision (a) or (b) of section 245.00 of this article, he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner for the purpose of alarming or seriously annoying such person, and he or she is thereby observed by such person in such place; or

2. he or she commits the crime of public lewdness, as defined in section 245.00 of this article, and within the preceding year has been convicted of an offense defined in such section 245.00 or this section.

Public lewdness in the first degree is a class A misdemeanor.

§ 245.05 Offensive exhibition

A person is guilty of offensive exhibition when he knowingly produces, operates, manages or furnishes premises for, or in any way promotes or participates in, an exhibition in the nature of public entertainment or amusement in which:

1. A person competes continuously without respite for a period of more than eight consecutive hours in a dance contest, bicycle race or other contest involving physical endurance; or

2. A person is held up to ridicule or contempt by voluntarily submitting to indignities such as the throwing of balls or other articles at his head or body; or

3. A firearm is discharged or a knife, arrow or other sharp or dangerous instrument is thrown or propelled at or toward a person.

Offensive exhibition is a violation.

§ 245.10 Public display of offensive sexual material; definitions of terms

The following definitions are applicable to section 245.11:

1. “Nudity” means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

2. “Sexual conduct” means an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

3. “Sado-masochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizzare[1] costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

4. “Transportation facility” means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

§ 245.11 Public display of offensive sexual material

A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, display board, viewing screen, moving picture screen, marquee or similar place, in such manner that the display is easily visible from or in any: public street, sidewalk or thoroughfare; transportation facility; or any place accessible to members of the public without fee or other limit or condition of admission such as a minimum age requirement and including but not limited to schools, places of amusement, parks and playgrounds but excluding rooms or apartments designed for actual residence; any pictorial, three-dimensional or other visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex, and that:

(a) depicts nudity, or actual or simulated sexual conduct or sado-masochistic abuse; or

(b) depicts or appears to depict nudity, or actual or simulated sexual conduct or sado-masochistic abuse, with the area of the male or female subject's unclothed or apparently unclothed genitals, pubic area or buttocks, or of the female subject's unclothed or apparently unclothed breast, obscured by a covering or mark placed or printed on or in front of the material displayed, or obscured or altered in any other manner.

Public display of offensive sexual material is a Class A misdemeanor.

§ 245.15 Unlawful dissemination or publication of an intimate image

1. A person is guilty of unlawful dissemination or publication of an intimate image when:

(a) with intent to cause harm to the emotional, financial or physical welfare of another person, he or she intentionally disseminates or publishes a still or video image of such other person, who is identifiable

from the still or video image itself or from information displayed in connection with the still or video image, without such other person's consent, which depicts:

(i) an unclothed or exposed intimate part of such other person; or

(ii) such other person engaging in sexual conduct as defined in subdivision ten of section 130.00 of this chapter with another person; and

(b) such still or video image was taken under circumstances when the person depicted had a reasonable expectation that the image would remain private and the actor knew or reasonably should have known the person depicted intended for the still or video image to remain private, regardless of whether the actor was present when the still or video image was taken.

2. For purposes of this section “intimate part” means the naked genitals, pubic area, anus or female nipple of the person.

2-a. For purposes of this section “disseminate” and “publish” shall have the same meaning as defined in section 250.40 of this title.

3. This section shall not apply to the following:

(a) the reporting of unlawful conduct;

(b) dissemination or publication of an intimate image made during lawful and common practices of law enforcement, legal proceedings or medical treatment;

(c) images involving voluntary exposure in a public or commercial setting; or

(d) dissemination or publication of an intimate image made for a legitimate public purpose.

4. Nothing in this section shall be construed to limit, or to enlarge, the protections that 47 U.S.C § 230 confers on an interactive computer service for content provided by another information content provider, as such terms are defined in 47 U.S.C. § 230.

Unlawful dissemination or publication of an intimate image is a class A misdemeanor.

2020 IL App (1st) 180110
446 Ill.Dec. 1

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Corey WEBB, Defendant-Appellant.

No. 1-18-0110

Appellate Court of Illinois,
First District,
First Division.

June 1, 2020

Background: Defendant was convicted in the Circuit Court, Cook County, Thomas Michael Davy, J., of unlawful possession of a weapon by a street gang member and aggravated unlawful use of a weapon. Defendant appealed.

Holdings: The Appellate Court, Griffin, J., held that:

(1) police officer's tackling defendant and restraining him did not violate his fourth amendment rights;

(2) insufficient evidence supported defendant's conviction for unlawful possession of a firearm by a street gang member; and

(3) trial court did not abuse its discretion in limiting testimony about the fact that an Independent Police Review Authority (IPRA) investigation had been conducted.

Affirmed in part, reversed in part, and remanded for resentencing.

Hyman, J., filed dissenting opinion.

1. Arrest ⚿63.4(1)

Before a police officer may arrest an individual, the officer must have probable cause that the person committed or is committing a crime. U.S. Const. Amend. 4.

2. Arrest ⚿60.2(10, 19)

A police officer may briefly detain an individual and perform a protective pat down when the officer has a reasonable suspicion that the individual is engaged in criminal activity and for purposes of officer safety. U.S. Const. Amend. 4.

3. Arrest ⚿60.2(10)

Before the police have acquired a reasonable suspicion of criminal activity, an individual has the right to avoid an encounter with police. U.S. Const. Amend. 4.

4. Arrest ⚿60.2(10)

When officers have acquired a reasonable suspicion of criminal activity and attempt to detain a suspect under *Terry*, that suspect is no longer free to leave or voluntarily terminate an encounter with the police. U.S. Const. Amend. 4.

5. Arrest ⚿60.2(10)

A defendant is required to submit to a *Terry* stop, so long as it is lawful at its inception, i.e. that the officers indeed had a reasonable suspicion of criminal activity sufficient to support the brief detention at its outset. U.S. Const. Amend. 4.

6. Arrest ⚿60.2(14)

If a defendant fails to submit to a lawful attempt at effectuating a *Terry* stop, the officers have the right to take steps to force compliance with their directives in order to effectuate a *Terry* investigative stop in a safe and effective manner. U.S. Const. Amend. 4.

7. Arrest ⚿60.2(14)

Police officer's tackling defendant and restraining him did not violate his fourth amendment rights, where officer had reasonable suspicion of criminal activity to support *Terry* stop of defendant, but defendant fled from officer when officer told defendant to stop. U.S. Const. Amend. 4.

8. Arrest ⚿60.4(1)

A person is not seized for purposes of the fourth amendment when the person does not yield to the officer's show of authority. U.S. Const. Amend. 4.

9. Constitutional Law ⚿4694

The Fourteenth Amendment to the United States Constitution requires that the government prove each element of a crime beyond a reasonable doubt before a person may be convicted of a crime. U.S. Const. Amend. 14.

10. Criminal Law ⚿1159.2(1)

While the Appellate Court gives great deference to a fact finder when it reviews for the sufficiency of the evidence, constitutional responsibility requires that it scrutinizes the evidence and determines whether the State proved enough at trial to meet its constitutional burden.

11. Weapons ⚿296

Insufficient evidence supported defendant's conviction for unlawful possession of a firearm by a street gang member, where State did not introduce specific evidence about the course or pattern of criminal activity to prove that the defendant was a member of a street gang. 720 Ill. Comp. Stat. Ann. 5/24-1.8(a)(1); 740 Ill. Comp. Stat. Ann. 147/10.

12. Weapons ⚿264

Trial court did not abuse its discretion in limiting testimony about the fact that an Independent Police Review Authority (IPRA) investigation had been conducted in connection with prosecution for unlawful possession of a weapon by a street gang member and aggravated unlawful use of a weapon; defendant was allowed to use officers' testimony from the IPRA hearing for impeachment purposes, but testimony about IPRA case itself would have distracted from the actual issue that the jury was to decide—whether defendant unlawfully possessed a weapon. 720 Ill. Comp. Stat. Ann. 5/24-1.8(a)(1).

13. Criminal Law ⚿410.10, 410.70

A defendant cannot introduce, through another witness, his own prior statements in an attempt to prove the truth of a matter that is the subject of those statements.

Appeal from the Circuit Court of Cook County, No. 10 CR 1705001, Honorable Thomas R. Davy and Honorable William B. Raines, Judges Presiding

Catharine D. O'Daniel, of Chicago, for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Christine Cook, and Clare Wesolik Connolly, Assistant State's Attorneys, of counsel), for the People.

OPINION

PRESIDING JUSTICE GRIFFIN delivered the judgment of the court, with opinion.

¶ 1 Following a jury trial, defendant was found guilty of unlawful possession of a weapon by a street gang member and aggravated unlawful use of a weapon. He appeals those convictions, arguing that the trial court erred when it denied his motion to quash arrest and suppress evidence, that the State did not prove that he was a member of a street gang, and that the trial court erred when it limited the trial testimony about the Independent Police Review Authority's investigation surrounding defendant's arrest. We hold that the trial court did not err when it denied defendant's motion to quash arrest and suppress evidence and did not abuse its discretion when it limited the scope of the testimony about the investigation into the police offi-

cers' conduct in making the arrest. We, however, hold that the evidence was insufficient to prove defendant's membership in a street gang. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

¶ 2 I. BACKGROUND

¶ 3 On September 10, 2010, at approximately 11:30 p.m., Chicago police officers were on patrol when they saw a large gathering of 30 to 40 people gathered in the street and on the sidewalk making a lot of noise. Officer Dennis Huberts and his partner arrived at the scene on the east side of the crowd, and two other officers arrived at the scene on the opposite side of the crowd. The four officers exited their vehicles with plans to disperse the crowd with the officers converging on the crowd from different directions.

¶ 4 The crowd was beginning to disperse, primarily toward the north and the west, when Officer Huberts saw defendant begin running eastward toward him and his partner. Officer Huberts observed defendant looking over his shoulder at the other set of police officers as he fled. Officer Huberts also saw that defendant was clutching something near his waistband as he was running. Officer Huberts announced his office and told defendant to stop. Defendant did not comply.

¶ 5 Officer Huberts chased defendant and put his hands on defendant's shoulders to try to stop him. Defendant continued to run and pull away from Officer Huberts, so Officer Huberts performed an "emergency takedown," grabbing defendant near his collar area and pulling him to the ground. While on the ground, defendant was resisting Officer Huberts's attempts to detain him, and defendant continued to stiffen his body and would not remove his hands from his waist area while Officer Huberts attempted to gain control over defendant on the ground. Officer Huberts struck defendant in the head multiple times in an attempt to secure defendant's compliance. After striking defendant, Officer Huberts and his partner were able to get control of defendant's arms and hands, and Officer Huberts went to the area that defendant had been holding and felt a weapon in defendant's waistband. Once defendant's hands were under control of the officers, Officer Huberts went and retrieved a Desert Eagle 9-millimeter handgun from the center of defendant's waistband. The officers then handcuffed defendant. All of the events took place in a matter of seconds.

¶ 6 Defendant was arrested and eventually charged with unlawful possession of a weapon by a street gang member and aggravated unlawful use of a weapon. While at the police station, defendant told the officers that he is a member of the Black P. Stones and that he had been a member of that gang for as long as he could remember. Defendant further stated that he got the gun from one of his fellow gang members. An assistant state's attorney memorialized defendant's statement and authorized the charges against him. After being at the police station for a period, defendant was transported by ambulance to the hospital. He underwent surgery for a broken jaw.

¶ 7 As the case against defendant progressed, defendant filed a motion to quash arrest and suppress evidence. In that motion, defendant argued that he was doing nothing wrong or illegal before the police officers ran up to him and threw him on the ground. Defendant stated that the officers began to punch and kick him and that they then searched him. He argued that any statement he allegedly made or any evidence uncovered during the search should be suppressed as being the product

of an unlawful search and seizure. The trial court denied defendant's motion.

¶ 8 At trial, the police officers' testimony was consistent with the narrative set forth above. However, defendant himself and two other eyewitnesses testified in defendant's defense. All three of these witnesses testified that the officers essentially targeted defendant and searched him for no reason. These witnesses also testified that the officers treated defendant harshly, including that they kicked him in the face, resulting in defendant ending up on the ground, spitting up blood. These witnesses testified that defendant was doing nothing wrong and that the officers just came at him for no reason. They testified that defendant did not have a weapon.

¶ 9 The jury found defendant guilty of both unlawful possession of a weapon by a street gang member and aggravated unlawful use of a weapon. The trial court sentenced defendant to five years' imprisonment. He now appeals his convictions.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues that (1) his motion to quash arrest and suppress evidence should have been granted, (2) the evidence was insufficient to prove that the Black P. Stones meet the statutory definition of a "streetgang," (3) the trial court erred when it denied his motion for a directed finding as to whether there was sufficient evidence that the Black P. Stones met the statutory definition of a streetgang, and (4) the trial court improperly limited the testimony about the Independent Police Review Authority's investigation launched into the circumstances surrounding defendant's arrest, namely that the officers used excessive force in arresting defendant. We agree with defendant on points two and three and we reject his arguments on points one and four.

¶ 12 A. Motion to Quash Arrest and Suppress Evidence

¶ 13 Defendant argues that the trial court erred when it denied his motion to quash arrest and suppress evidence. Defendant contends that his fourth amendment rights were violated where the officers on scene did not see him do anything illegal or improper before they violently detained him. Under the circumstances, defendant maintains that when he was tackled and restrained by the officers it constituted an impermissible arrest, not a lawful *Terry* stop, because the officers restrained him with physical force before they had made any observations that could constitute probable cause or even a reasonable suspicion of criminal activity.

[1, 2] ¶ 14 Before a police officer may arrest an individual, the officer must have probable cause that the person committed or is committing a crime. *People v. Sledge*, 92 Ill. App. 3d 1051, 1058, 48 Ill.Dec. 381, 416 N.E.2d 412 (1981). In contrast, a police officer may briefly detain an individual and perform a protective pat down when the officer has a reasonable suspicion that the individual is engaged in criminal activity and for purposes of officer safety. *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

¶ 15 Officer Huberts testified that he saw defendant running from the crowd and clutching his waistband. Defendant was running toward Officer Huberts and his partner. Officer Huberts believed that the manner in which defendant was grabbing near his waistband was indicative of defendant having a gun concealed in that area. The officers' testimony portrayed the scene as somewhat chaotic, with a large group of individuals creating a noise disturbance and then scattering to disperse when the police arrived. The officers encountered defendant in a high-crime area at approximately 11:30 at night. Defendant

fled from one set of officers, but that meant that he was running *toward* Officer Huberts and his partner while he was fixated on his waistband, leading the officers to suspect that defendant was armed while running in their direction. The officers reasonably perceived an officer safety issue.

¶ 16 The officers had a reasonable suspicion that defendant was engaged in criminal activity when he ran from the crowd, grabbing near his waist, in a manner that suggested he was carrying a weapon. The officers provided, both at trial and at the hearing on the motion to suppress evidence, a reasonable basis upon which they believed defendant was armed. Defendant was acting far different than the others in the crowd that were dispersing, and his nervous and evasive behavior culminated in flight. In the officers' experience, defendant's fixation on his waistband area in a manner suggesting he had a weapon concealed there as he fled indicated that he was armed. The officers in this case had seen dozens of people carrying weapons in the past who conducted themselves as defendant did here. See *Terry*, 392 U.S. at 27, 88 S.Ct. 1868 ("in determining whether the officer acted reasonably in such circumstances, due weight must be given *** to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

¶ 17 When the officers attempted to detain defendant in furtherance of the above-established reasonable suspicion of criminal activity, defendant resisted their attempts to effectuate a *Terry* stop. He continued to run from Officer Huberts after Officer Huberts announced his office and told defendant to stop. Then, when Officer Huberts put his hands on defendant's shoulders to try to stop him, defendant tried to pull away. It was at that point that Officer Huberts elevated the level of force, by tackling defendant, to a level that would ordinarily only be permissible for an arrest.

¶ 18 There are two inferences that can be drawn regarding the reason that defendant was grabbing near his waist. One, that he was wearing baggy pants and was grabbing near his waist to hold up his pants as he ran or, two, that he was grabbing near his waist because he had a firearm concealed there. Our standard of review requires us to draw that inference in the State's favor. Moreover, there is no statement anywhere in the record that defendant was grabbing in his waist area to keep his pants from falling down as he ran. To the contrary, defendant and the witnesses who testified on his behalf testified that he never even ran from the police. The jury disbelieved them. Any leap to the idea that defendant could have been holding his pants up to stop them from falling down is in derogation of our role on appeal and is not supported by the evidence in any way.

[3–6] ¶ 19 Before the police have acquired a reasonable suspicion of criminal activity, an individual has the right to avoid an encounter with police. *People v. Timmsen*, 2016 IL 118181, ¶ 10, 401 Ill. Dec. 610, 50 N.E.3d 1092. However, when officers have acquired a reasonable suspicion of criminal activity and attempt to detain a suspect under *Terry*, that suspect is no longer free to leave or voluntarily terminate an encounter with the police. *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 60, 350 Ill.Dec. 963, 949 N.E.2d 755 (under *Terry*, a police officer is specifically permitted to briefly detain an individual to investigate the possibility of criminal behavior absent probable cause, and during the course of a *Terry* stop, a person is "no more free to leave than if he were placed under a full arrest" (internal quotation marks omitted)). A defendant is re-

quired to submit to the *Terry* stop, so long as it is lawful at its inception, *i.e.* that the officers indeed had a reasonable suspicion of criminal activity sufficient to support the brief detention at its outset. If a defendant fails to submit to a lawful attempt at effectuating a *Terry* stop, the officers have the right to take steps to force compliance with their directives in order to effectuate a *Terry* investigative stop in a safe and effective manner. See *People v. Johnson*, 387 Ill. App. 3d 780, 791, 327 Ill.Dec. 127, 901 N.E.2d 455 (2009); *People v. Eyler*, 2019 IL App (4th) 170064, ¶ 23, 440 Ill. Dec. 436, 153 N.E.3d 1012.

[7, 8] ¶ 20 Here, when Officer Huberts had acquired a level of knowledge sufficient to constitute a reasonable suspicion of criminal activity, he told defendant to stop, but defendant did not heed the instructions. Instead, defendant continued his flight. A person is not seized for purposes of the fourth amendment when the person does not yield to the officer's show of authority. *California v. Hodari D.*, 499 U.S. 621, 625-26, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). When Officer Huberts tried to force defendant to stop by putting his hands on defendant's shoulders, defendant still refused to submit to the officer's then-legal authority to force compliance. Because of defendant's continued noncompliance, Officer Huberts was entitled to take further steps to detain defendant involuntarily. While an officer would surely not have authority to tackle an individual that was submitting to a *Terry* stop as directed, defendant's refusal to submit to a lawful *Terry* stop made the circumstances such that Officer Huberts was entitled to take steps to force defendant's compliance with the officers' commands. The officers had reasonable suspicion of criminal activity to support a *Terry* stop, and when defendant failed to comply, the officer's actions in tackling defendant and restraining him did not violate his fourth amendment rights.[1] The trial court did not err when it denied defendant's motion to quash arrest and suppress evidence.

¶ 21 B. Sufficiency of the Evidence as to Defendant's Membership in a Street Gang

[9–11] ¶ 22 Defendant argues that the evidence was insufficient to support a conviction for unlawful possession of a firearm by a street gang member because the State failed to prove the essential elements of that offense beyond a reasonable doubt. The fourteenth amendment to the United States Constitution requires that the government prove each element of a crime beyond a reasonable doubt before a person may be convicted of a crime. *In re Winship*, 397 U.S. 358, 363-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). On appeal, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272, 322 Ill.Dec. 574, 891 N.E.2d 865 (2008). While we give great deference to a fact finder when we review for the sufficiency of the evidence, our constitutional responsibility requires that we scrutinize the evidence and determine whether the State proved enough at trial to meet its constitutional burden. *People v. Hernandez*, 312 Ill. App. 3d 1032, 1037, 246 Ill.Dec. 65, 729 N.E.2d 65 (2000).

1. After this case was set for oral argument, defendant filed a motion seeking leave to cite additional authority. In particular, defendant referred us to our decision in *People v. Horton*, 2019 IL App (1st) 142019-B, 436 Ill.Dec. 453, 142 N.E.3d 854, and asked us to consider that opinion in resolving this appeal. We granted defendant to cite the additional authority and have taken *Horton* into account in arriving at this decision.

¶ 23 To prove that a defendant committed the offense of unlawful possession of a firearm by a street gang member, the State must prove that the defendant knowingly possessed a firearm in public and without a valid Firearm Owner's Identification Card and that he is a member of a street gang. 720 ILCS 5/24-1.8(a)(1) (West 2010). For purposes of that offense, "streetgang" or "gang" has the meaning ascribed to it in section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act (740 ILCS 147/10 (West 2010)). The Illinois Streetgang Terrorism Omnibus Prevention Act defines "streetgang" as "any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity." 740 ILCS 147/10 (West 2010).

¶ 24 Defendant contends that the State failed to prove at his trial that the Black P. Stones is a "streetgang" under the requisite definition. Defendant moved for a directed finding on this issue at the close of the State's case-in-chief and he argues on appeal that his motion should have been granted. The parties both refer us to *People v. Murray*, 2019 IL 123289, ¶¶ 36, 51, 440 Ill.Dec. 642, 155 N.E.3d 412,[2] in which the Illinois Supreme Court addressed the applicable statutes and held that the State was required to introduce specific evidence about the course or pattern of criminal activity to prove that the defendant was a member of a street gang.

¶ 25 The State concedes that the outcome in this case is controlled by *Murray*. Accordingly, the State acknowledges that we should grant defendant the same relief the supreme court granted in that case: reversing defendant's conviction for unlawful possession of a firearm by a street gang member. See *Murray*, 2019 IL 123289, ¶ 53, 440 Ill.Dec. 642, 155 N.E.3d 412. We agree that the proper result is a reversal of defendant's conviction for unlawful possession of a firearm by a street gang member.

¶ 26 C. Admissibility of Evidence Concerning the Independent Police Review Authority Investigation

¶ 27 Defendant argues that the trial court erred when it granted the State's motion *in limine* prohibiting defendant from eliciting testimony about an Independent Police Review Authority (IPRA) investigation into the circumstances surrounding defendant's arrest. Defendant contends that the trial court's limitation on trial testimony about the IPRA investigation infringed on his constitutional right to confront the witnesses against him. Defendant argues that evidence about the IPRA investigation was relevant to his defense and that it should have been admitted for the purpose of showing the officers' bias as well as their motive to testify falsely at trial.

¶ 28 In ruling on the State's motion *in limine* to forbid defendant from introducing evidence about the IPRA investigation, the trial court ruled that defendant was entitled to introduce all the evidence that made up the substance of the IPRA investigation but that he could not elicit testimony about the fact that an IPRA investigation had, in fact, been conducted. Defendant really raises two separate arguments concerning the IPRA investigation. First, he argues that the trial court incorrectly ruled on the State's motion *in*

2. At the time defendant filed his brief, the Illinois Supreme Court had not yet filed the opinion in *Murray*. However, before the State filed its response brief, the supreme court had decided the case.

limine on the issue. Second, defendant argues that while his counsel was cross-examining the officers about the arrest, the trial court improperly sustained objections in which his counsel intended to impeach the officers by using their testimony from the IPRA hearing.

[12] ¶ 29 The trial court did not abuse its discretion by limiting evidence about the IPRA investigation in the manner in which it did. Defendant was fully entitled to and did introduce evidence about the circumstances surrounding the detention and arrest, including that he suffered a broken jaw and required surgery. Defendant was permitted to elicit testimony to support his contention that the officers used excessive force, and defendant was able to present his defense that the gun was planted by the officers. Defendant testified in his own defense on the substance of these matters as well. All that defendant was prohibited from exploring at trial was the fact that an IPRA investigation had taken place. The trial court even ruled that defendant could elicit evidence that the officers had testified about the events in a certain way at a "prior hearing," just that the defense could not use the term "IPRA." The trial court expressly ruled that defendant could use the officers' testimony from the IPRA hearing for impeachment purposes.

¶ 30 Even though the IPRA investigation was concluded with a favorable ruling for the officers, the trial court was entitled to find in its discretion that testimony about the IPRA case would distract from the actual issue that the jury was present to decide—whether defendant unlawfully possessed a weapon. See *People v. Sykes*, 224 Ill. App. 3d 369, 375, 166 Ill.Dec. 671, 586 N.E.2d 629 (1991). The trial court indicated that if it were to allow defendant to introduce the fact that and IPRA investigation was opened into the circumstances surrounding defendant's arrest, it would also allow the State to introduce the fact that the investigation was concluded and it was resolved in the officers' favor. Defendant objected to the trial court allowing evidence of the decision in the IPRA case to be introduced at trial. So the trial court crafted an evidentiary ruling that allowed both sides to achieve most of their ends but left both somewhat unsatisfied. The fact that the IPRA investigation had concluded and was resolved favorably for the officers undercuts defendant's contention that the existence of an IPRA investigation would have motivated the officers to testify in a certain way at trial. In the end, defendant was allowed to present, and the jury was allowed to hear, all of the substance from the IPRA investigation; defendant was simply prohibited from referring to the existence of any official investigation. The jury heard about the alleged police misconduct, including about the injury inflicted on defendant and about the officers allegedly fabricating the evidence that defendant was in possession of a gun in order to cover up their own wrongdoing. The trial court did not abuse its discretion in ruling on the motion *in limine* at issue.

¶ 31 A separate issue is defendant's contention that the trial court improperly sustained the State's objections when defendant attempted to impeach the officers with statements that they had made during the IPRA hearing. Defendant argues that the testimony that Officer Huberts gave at the IPRA hearing was inconsistent with the testimony he gave at trial and during the hearing on defendant's motion to suppress evidence, particularly about the timing in which defendant complained about the injury to his jaw that he sustained when the officers detained him.

¶ 32 At trial, Officer Huberts testified that defendant did not complain about being in pain before or during his interroga-

tion or the time at which he made inculpatory statements to the officers. Officer Huberts testified that it was only after defendant made inculpatory statements and had been placed in lockup that the officers noticed he was injured. However, during the IPRA hearing, Officer Huberts testified that defendant stated that his jaw was "messed up" while the officers were *processing* defendant. Defendant argues that the inconsistency in the timing that Officer Huberts had attested to was relevant and should have been allowed to impeach the officers' trial testimony.

[13] ¶ 33 The evidence that defendant argues should have been permitted was the statements he claims that he made to officers about his injury. Defendant is arguing that he should have been able to introduce his own postarrest, out-of-court statements to the officer. A defendant cannot introduce, through another witness, his own prior statements in an attempt to prove the truth of a matter that is the subjects of those statements. *People v. Woods*, 292 Ill. App. 3d 172, 178, 226 Ill. Dec. 57, 684 N.E.2d 1053 (1997); see also *People v. Patterson*, 154 Ill. 2d 414, 452, 182 Ill.Dec. 592, 610 N.E.2d 16 (1992) (out of court, self-serving statements by an accused are inadmissible hearsay).

¶ 34 Defendant testified at trial and was fully entitled to testify about what he told the officers or to explore the issue about when the officers knew or should have known about his injuries. Defendant was not, however, entitled to introduce, through the officers, statements he allegedly made with the intended purpose being to prove when the officers might have known about his injuries. The prior consistent statements that defendant claims he should have been entitled to introduce to the jury would have had the purpose of improperly bolstering his trial testimony without falling into any hearsay exception. See *People v. House*, 377 Ill. App. 3d 9, 19, 316 Ill.Dec. 147, 878 N.E.2d 1171 (2007) (proof of a prior consistent statement made by a witness is inadmissible hearsay, which may not be used to bolster a witness's testimony). The trial court did not abuse its discretion when it sustained the State's objection to defendant's line of questioning about what defendant said to the officers regarding his injuries. Defendant has failed to demonstrate that the trial court's rulings on these evidentiary issues entitle him to any relief. See *People v. Short*, 2014 IL App (1st) 121262, ¶¶ 102-105, 386 Ill.Dec. 441, 20 N.E.3d 817.

¶ 35 III. CONCLUSION

¶ 36 Accordingly, we affirm in part, reverse in part, and remand for resentencing.

¶ 37 Affirmed in part and reversed in part; cause remanded.

Justice Pierce concurred in the judgment and opinion.

Justice Hyman dissented, with opinion.

¶ 38 JUSTICE HYMAN, dissenting:

¶ 39 One fact—the officers' order to disperse—sets this case apart. This is not the traditional case arising under *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), because Webb's flight followed the order to disperse and so was not unprovoked. This doctrinal wrinkle aside, the majority's decision ultimately runs afoul of the fourth amendment's superseding mandate: reasonableness. See *People v. Timmsen*, 2016 IL 118181, ¶ 9, 401 Ill.Dec. 610, 50 N.E.3d 1092 ("touchstone of the fourth amendment is *** reasonableness" (internal quotation marks omitted)). In my view, it is patently unreasonable for police officers to induce flight by ordering a large group to disperse and then rely on that same flight as part of

their justification to detain someone. Although fourth amendment doctrine does not have a word for it, in other areas of criminal law, we call it entrapment—to induce someone to do something for which there is no evidence he or she would have otherwise done and to later hold that behavior against them. See 720 ILCS 5/7-12 (West 2018) (defining defense of entrapment). I consider this practice incompatible with basic fourth amendment principles.

¶ 40 Moreover, the majority's reasoning has unworkable practical implications. Confronted with a similar order to leave, what is a person to do? Move too slowly and be accused of disobeying the order? Move too quickly and come under suspicion? The fourth amendment does not require ordinary people to calibrate their behavior to such a minute degree. I respectfully dissent.

¶ 41 As an initial matter, I find it important to make explicit the point at which the officers seized Webb. We must decide that moment because we evaluate only the information the officers had *before* that moment when determining the seizure's lawfulness. *E.g.*, *People v. Close*, 238 Ill. 2d 497, 514, 345 Ill.Dec. 620, 939 N.E.2d 463 (2010) (Burke, J., dissenting) (first step in determining whether seizure was reasonable is " 'whether the officer's action was justified at its inception' " (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968))). I read the majority opinion to tacitly find that the officers had conducted a *Terry* stop from the moment they placed hands on Webb. See *supra* ¶ 20 ("putting his hands on [Webb]'s shoulders" was a "lawful *Terry* stop"). The State concedes as much. I would make express what the majority implies: when officers touched Webb, he was seized for the purposes of the fourth amendment and we look only to Webb's behavior before then to determine whether officers had the authority to touch him.

¶ 42 An officer seizes a person for fourth amendment purposes when the officer makes a sufficient show of authority indicating to a reasonable person that compliance is required and the person under suspicion submits to that authority. See *California v. Hodari D.*, 499 U.S. 621, 628-29, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Importantly, Webb's resistance after the officers initially grabbed him did not defeat their initial seizure of him. When *Hodari D.* spoke of compliance with an officer's show of authority, the United States Supreme Court's primary concern was a suspect who completely frees themselves from the officer's control. The court spoke of an arrestee defeating an officer's seizure by "escap[ing]" or "br[eaking] away" and entering a "period of fugitivity." *Id.* at 625, 111 S.Ct. 1547. The Illinois Supreme Court has thought of this issue in a similar way—the question is not whether a suspect was cooperative, the question is whether the suspect completely defeats the seizure and interrupts the causal chain between the seizure and discovery of contraband. See *People v. Henderson*, 2013 IL 114040, ¶ 44, 370 Ill.Dec. 804, 989 N.E.2d 192 ("defendant's flight *** interrupt[ed] the causal connection between" his seizure and the discovery of a gun).

¶ 43 Nothing broke the link between the officers' initial touching of Webb and applying further force that finally brought him under submission. This means that the officers' actions must have been justified at the moment of the initial touching. In other words, Webb's later resistance cannot be used as part of the calculus for determining reasonable suspicion because it took place *after* he had been seized.

¶ 44 And unlike the majority, I disagree that the officers had enough information to justify Webb's seizure. The majority takes

Webb's flight coupled with his holding his saggy pants as sufficient ground on which to detain him. I disagree with this analysis on its own terms. We have held a person's flight insufficient to warrant reasonable suspicion of criminal activity. *In re D.L.*, 2018 IL App (1st) 171764, ¶ 28, 438 Ill.Dec. 845, 147 N.E.3d 114 ("Although [u]nprovoked flight in the face of a potential encounter with police may raise enough suspicion to justify the ensuing pursuit and investigatory stop *** [citation], there is no bright-line rule authorizing the temporary detention of anyone who flees at the mere sight of the police [citation]." (Emphasis and internal quotation marks omitted.)). We also have explained that a defendant putting his hands in the pockets of his saggy pants not to be indicative of criminal activity. *In re Rafeal E.*, 2014 IL App (1st) 133027, ¶ 30, 383 Ill.Dec. 206, 14 N.E.3d 489 ("Putting something in one's pockets, in this case, one's hands, is not a hallmark of criminal activity."). I see no reasoned basis on which to distinguish a defendant who puts his hands in his pockets with one who holds up his saggy pants. See *People v. White*, 2020 IL App (1st) 171814, ¶ 37, 442 Ill.Dec. 574, 160 N.E.3d 147 (Hyman, J., specially concurring) (describing as "unworkable" any *per se* distinction between walking, jogging, or running from police officer).

¶ 45 That said, accepting the suspicion aroused by flight as a given, the officers' order to disperse dramatically alters the analysis. In each case the State cites where flight was a factor in the analysis of reasonable suspicion, including *Wardlow*, the defendant fled from police officers without any evidence of provocation. See *Wardlow*, 528 U.S. at 124-25, 120 S.Ct. 673 ("[h]eadlong flight" when "unprovoked" is the "consummate act of evasion"); see also *People v. Salgado*, 2019 IL App (1st) 171377, ¶ 3, 438 Ill.Dec. 919, 147 N.E.3d 188 (defendant and companion "immediately broke apart and walked in different directions" on mere sight of a police car); *People v. Johnson*, 2019 IL App (1st) 161104, ¶ 3, 442 Ill.Dec. 768, 160 N.E.3d 948 (defendant " 'walk[ed] briskly *** as if to avoid' " police officers on mere sight of the officers' SUV in alley). Here, Webb's fleeing was not an "act of evasion" but, rather the opposite, an act of compliance. *Contra Wardlow*, 528 U.S. at 124-25, 120 S.Ct. 673.

¶ 46 I also reject the State's argument that interpreting Webb's flight as compliance with the officers' orders requires probing his "subjective state of mind." We use "commonsense judgments and inferences about human behavior" when determining what constitutes suspicious behavior. *Id.* at 125, 120 S.Ct. 673. Notions of common sense inform us that a group ordered by police to disperse will comply. See *Hodari D.*, 499 U.S. at 627, 111 S.Ct. 1547 ("policemen do not [give commands] expecting to be ignored"). It goes without saying that members of the group may disperse at varying speeds. Courts in other jurisdictions have similarly used common sense to acknowledge the risk that "police officers can create reasonable suspicion or even probable cause where there was none by coercively infringing upon the individual's right to be let alone, and waiting for an arguably suspicious reaction." *State v. Young*, 2006 WI 98, ¶ 45, 294 Wis. 2d 1, 717 N.W.2d 729; see also *id.* ¶ 45 n.15 (citing 4 Wayne R. LaFave, Search and Seizure § 9.4(d), at 461-62 (4th ed. 2004), citing *Commonwealth v. Thibeau*, 384 Mass. 762, 429 N.E.2d 1009 (1981)). The officers' behavior here manifests that risk.

¶ 47 For similar reasons, I would reject one of the trial court's factual findings as against the manifest weight of the evidence. *E.g.*, *People v. Manzo*, 2018 IL 122761, ¶ 25, 432 Ill.Dec. 598, 129 N.E.3d 1141 (reciting standard of review). The

trial court found, "someone coming in the officer's direction holding their waistband is certainly justification which would be described as if not bizarre behavior *** certainly behavior that would justify a further inquiry for officer safety." The evidence does not support the trial court's conclusion. Testimony shows that officers came up to the group from all sides. As far as the record reveals, any direction Webb could have gone would have required him to move toward an officer. I do not find Webb's behavior "bizarre" or, under the circumstances, an indication of dangerousness.

¶ 48 Perhaps more important than the trial court's unsupported factual premise is its misstatement of the law. Officers cannot support their decision to *stop* someone based on a belief that the person poses a danger—that is the standard for a frisk, not a stop. See *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (*en banc*) (distinguishing between the requirements for *Terry* stop and a *Terry* frisk (citing *Arizona v. Johnson*, 555 U.S. 323, 326-27, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009))). Only suspicion that a defendant committed, was committing, or was about to commit a *crime* can support a stop. *Id.* The trial court's invocation of the officers' fear for their safety as a reason to stop Webb misapplies fourth amendment law.

¶ 49 Here, that distinction makes a difference. The officers did not suggest that Webb's saggy pants made them suspicious that he was committing a crime, only that he may be armed. Of course, in Illinois, suspicion that a person is armed, without more information, does not constitute suspicion of criminal activity. See *People v. Burns*, 2015 IL 117387, ¶ 32, 413 Ill.Dec. 810, 79 N.E.3d 159 (finding criminal offense of carrying gun outside home to be facially unconstitutional).

¶ 50 So what is left? It appears to me the officers believed holding up saggy or baggy pants was evidence of criminal activity. But that is not *particularized* suspicion, which the fourth amendment requires. *E.g.*, *People v. Gaytan*, 2015 IL 116223, ¶ 20, 392 Ill.Dec. 333, 32 N.E.3d 641 ("officers must have 'a *particularized* and objective basis for suspecting the particular person stopped' was violating the law" (emphasis added) (quoting *Navarette v. California*, 572 U.S. 393, 396, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014))). Indeed, it is nothing but a hunch based on a common mode of dress.

¶ 51 I cannot agree that a style choice with a varied history should ever be a basis for suspicion of *criminal* activity. See Gene Demby, *Sagging Pants and the Long History of "Dangerous" Street Fashion*, NPR (Sept. 11, 2014, 8:18 AM), https://www.npr.org/sections/codeswitch/2014/09/11/347143588/sagging-pants-and-the-long-history-of-dangerous-street-fashion [https://perma.cc/9RWE-RD35]. Though not in the record, I worry that saggy pants, a male fashion statement, may be celebrated (see Brooke Bobb, *Could You Love a Man in the Baggy Pants That Took Over the Runways This Season?*, Vogue (Jan. 22, 2019), https://www.vogue.com/article/fall-2019-menswear-baggy-pants-trend [https://perma.cc/TS5N-TRH5]), yet used as a proxy for suspected criminality. See Shahid Abdul-Karim, *For Some, Sagging Pants Carry Greater Meaning*, Wash. Times (July 13, 2014), https://www.washingtontimes.com/news/2014/jul/13/for-some-sagging-pants-carry-greater-meaning [https://perma.cc/LP99-9FJT] (noting " '[s]kateboarders and hipsters' " can wear saggy pants without attracting ire of police). I acknowledge the officers' experience finding weapons on individuals who grabbed their waist while wearing saggy pants (*supra* ¶ 16), but the officers' suspicion must have been based

on facts particularized to Webb. Nothing in the record points to a particularized suspicion—for example, an unusual bulge, a glint of metal, or a report of someone with a gun.

¶ 52 As a final side note, I agree with the majority's decision not to spend much time analyzing *People v. Horton*, 2019 IL App (1st) 142019-B, 436 Ill.Dec. 453, 142 N.E.3d 854. See *supra* ¶ 20 n.1. It is too different to help: *Horton* did not involve any police directives, let alone an order to disperse.

¶ 53 In sum, the primary fact the officers relied on to detain Webb—his flight toward them—was entirely the result of the officers' own actions. I cannot agree that it is reasonable under the fourth amendment for police officers to essentially trick people into behavior the law considers "suspicious," so I dissent.

2020 IL App (1st) 180718
446 Ill.Dec. 13

Alma WILLIS, Plaintiff-Appellant,

v.

Mauricio MORALES, M.D.; Ching-Chong Huang, M.D.; Jeffery Flagg, D.D.S., M.D.; David McCormick; Paul Kowalczyk; Kim Price; and Sisters of St. Francis Health Services, Inc., d/b/a St. James Hospital and Health Centers, Chicago Heights, Illinois, and d/b/a St. James Anesthesia, Defendants-Appellees.

No. 1-18-0718

Appellate Court of Illinois,
First District,
FIRST DIVISION.

June 15, 2020

Background: Patient sued surgeon, anesthesiologists, and nurse anesthesiologists alleging that their negligence during surgery injured her. Prior to trial, the medical defendants filed a motion in limine to bar all evidence related to count seeking recovery on theory of res ipsa loquitur and the Circuit Court, Cook County, Kay M. Hanlon, J., granted the motion. Following trial, the jury returned a verdict in favor of the medical defendants. Patient filed a post-trial motion raising the issue of res ipsa loquitur. The Circuit Court, Hanlon, J., denied the motion and entered judgment on the jury verdict. Patient appealed.

Holdings: The Appellate Court, Walker, J., held that:

(1) two issue rule did not bar patient from challenging trial court's ruling concerning res ipsa loquitur, and

(2) patient was entitled to present evidence that injury to her median nerve would not have occurred absent negligence, and thus patient was entitled to jury instruction on res ipsa loquitur theory.

Reversed and remanded.

Hyman, J., filed a dissenting opinion.

1. Appeal and Error ⚿3943(2)

When multiple claims, theories, or defenses were presented to the jury, without the submission of special interrogatories or separate verdict forms, the return of a general verdict creates a presumption that the evidence supported at least one of the claims, theories, or defenses and will be upheld.

2. Appeal and Error ⚿3943(2)

"Two issue rule" did not bar patient from challenging trial court's ruling concerning res ipsa loquitur in patient's medical negligence action; return of general verdict created presumption that evidence

Union Wallowa Counties Local Rules, Rule 3.011

Rule 3.011. Decorum Provisions for 10th Judicial District

Effective: February 1, 2021

(1) Proper attire and appropriate behavior is required by everyone entering the Union or Wallowa County Circuit Court and will be strictly enforced. Anyone not properly dressed upon arriving in the courtroom may be sent away until properly dressed.

(2) The following apparel items are unacceptable:

(a) Tube tops, tank tops, halter tops, bare midriff tops, see-through tops;

(b) Shorts;

(c) Dresses shorter than the fingertips of extended arms;

(d) Skirts or pants with waists that allow undergarments to be seen;

(e) Clothing with large holes, cut-off sleeves or pants;

(f) Hats or bandanas/do-rags;

(g) Clothing that display controlled substances (tobacco, alcohol, drugs), double meanings, hate motivated behavior, illegal activities, obscene gestures or language, profanity, sexual references, or violence;

(h) Bare feet;

(i) Chains that could be used as weapons;

(j) Garments meant to be worn as undergarments, worn as outer garments and sagging, bagging or dragging pants;

(3) No chewing gum or tobacco use in the courtroom. If you are chewing tobacco or gum upon arrival to court, you will be required to remove them before entering the courtroom.

(4) Please remember, your choice of clothing reflects an attitude when appearing before the court. The following attire is suggested for all non-lawyers appearing in court.:

(a) MALE--long or short sleeve shirts with collars. Slacks or dress denim trousers;

(b) FEMALE--Dresses, skirts, or slacks and blouse.

(5) During designated emergency situations, public safety may require relevant personal protective apparel including, but not limited to facial masks. Everyone appearing in court, attorneys, parties, witnesses, observers, court staff will be expected to follow any prescribed safety measure. This requirement is authorized by ORS 1.010, ORS 1.177, and UTCR 3.010.

(6) Attorneys are responsible for making their clients and witnesses aware of the decorum requirements.

THANKS to all of you whose generous contributions have made the work of the nonprofit

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We look forward to seeing you again soon!