[J-10-2022] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 62 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 1813 MDA
	:	2019 dated January 12, 2021,
v.	:	reconsideration denied March 17,
	:	2021, Affirming the Judgment of
	:	Sentence of the Dauphin County
CARL GAMBY,	:	Court of Common Pleas, Criminal
	:	Division, at No. CP-22-CR-0002561-
Appellant	:	2019 dated September 12, 2019
	:	
	:	ARGUED: March 9, 2022

DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: September 29, 2022**

I respectfully dissent. To support a conviction for indecent assault, the Commonwealth must establish that the actor (1) touched, for purposes of sexual gratification, (2) an intimate part of the body. This case does not implicate the first prong. Instead, it presents the straightforward question of whether the General Assembly intended, when defining the term "indecent contact," to include the neck as an "intimate part" of the body.[1] While undefined, I conclude that to be an "intimate part" the body part must customarily be hidden from public view due to its personal and private nature. The neck does not qualify as such.

[1] 18 Pa.C.S. §§ 3126(a) (criminalizing "indecent contact"); 3101 (defining "indecent contact" to include "touching of the sexual or other intimate parts").

Instead of analyzing whether the neck itself is an "intimate part" of the body, the Majority deems the actor's conduct a relevant consideration as to both elements, which in effect permits the Commonwealth to convict based solely on whether that conduct was done for purposes of sexual gratification. The Majority claims that it separates the actor's conduct from whether a part is intimate, but its analysis and conclusion show otherwise. In my view, the simpler conclusion, which is in line with legislative intent, is that determining whether a given body part is intimate or not calls for a yes-or-no answer with a threshold question of whether the body part is normally shielded from public view. Under that standard, the neck is not an intimate part of the body and the conviction at that count should be discharged.

I.

Initially, I agree with the Majority that the General Assembly's use of the word "intimate" signals an intent to prohibit the touching of more body parts than just the genitalia. *See* Maj. Op. at 14. I also agree with the fundamental point that the General Assembly easily could have delineated a list of body parts if it so chose, and the fact that it did not is important in ascertaining the meaning of the term.

My agreement with the Majority largely ends there. I conclude that the General Assembly intended for "intimate" to require that because of its intimate nature, the body part be customarily shielded from public view, which does not call for any examination of conduct. The Majority, in contrast, effectively holds that any body part is intimate by focusing on how the neck can be used in "sexual relations."

> We find that, in ordinary social interaction, the neck is a personal and private body part. Similarly, we find that an adult does not usually touch or kiss the neck of another adult outside of personal or intimate relationships. Finally, we

> observe that a person's neck is routinely associated with sexual relations or intimacy. Indeed, we note that the term "necking," while broadly meaning "the act or practice of kissing and caressing amorously," is, as its name suggests, also specifically identified with the sexual kissing of the neck. Thus, we hold that the neck is an intimate body part for purposes of Section 3126.

Id. at 24 (footnotes and citation omitted).

To be clear, the Majority claims it does not hold that any body part may qualify as an intimate one. But where and how does it draw the line? If a relevant factor is whether the body part is one that we expect strangers not to touch, then virtually every body part is potentially included. The additional factor of whether a body part is "routinely associated" with sexual relations or intimacy lends itself to uncertain application. Are courts supposed to determine whether a body part has crossed the undefined threshold of "sometimes associated" with sexual activity to "routinely associated" with sexual activity? (Is foot fetishism sufficiently widespread that any toe is an intimate body part?)[2] In practice the Majority has rewritten the General Assembly's definition of "indecent contact" to say "Any touching of any body part for the purpose of arousing or gratifying sexual desire, in any person." Instead, acts like kissing or touching (or probing or groping or fondling or anything else) have nothing to do with how we classify the body part that is

[2] The Majority believes that the question posed makes its point because "a fetish, by definition, is uncommon, whereas the neck, as demonstrated above, is commonly associated with sexual relations." Maj. Op. at 25. The Majority misses my point. Under the Majority's formulation of the test for a body part that is intimate, a court must have insight into what is "common" or "routinely associated with" sexual relations or intimacy. Maj. Op. at 24, 25. I suggest that such determinations are best left to experts like William H. Masters and Virginia E. Johnson. *See* Thomas Maier, MASTERS OF SEX: THE LIFE AND TIMES OF WILLIAM MASTERS AND VIRGINIA JOHNSON, THE COUPLE WHO TAUGHT AMERICA HOW TO LOVE (2009) (chronicling the lives and research of two of America's most prominent sexologists, who studied human sexuality from the 1950s through the 1990s).

targeted by those acts. The act of touching itself is relevant only to whether it was done for a sexual gratification.

I conclude that the General Assembly did not intend for courts to engage in a freewheeling assessment of the actor's conduct in determining whether a body part is intimate but instead intended for this statute to apply only to body parts that are normally shielded from public view because of their personal and private nature. As the Majority explains, the inspiration for this legislation was Model Penal Code Section 213.4. The overarching purpose of Article 213 is explained in the introductory note.

> Article 213 contains the provisions of the Model Code on the complex and controversial subject of rape and related sex offenses. With respect to the crime of rape itself, the Model Code seeks to introduce a rational grading scheme by dividing the offense into three felony levels, reserving the most serious category for those instances of aggression resulting in serious bodily injury or for certain cases of imposition where there is no voluntary social and sexual relationship between the parties. The remaining sex offenses are classed as second- or third-degree felonies, and in some cases as misdemeanors.
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> Section 213.4 defines the offense of sexual assault, which is graded as a misdemeanor. Sexual contact is defined as any touching of the sexual or intimate parts of another person for the purpose of arousing or gratifying the sexual desire of either party.

MPC § 213, comment.

The placement of Section 213.4 under the larger umbrella of Article 213 reflects that the primary goal of the section was to capture sexual offenses. While the MPC did not define "intimate parts" or offer any limitation on which parts would qualify as "sexual

or intimate," its placement alongside other sex crimes[3] indicates that the MPC drafters intended "sexual" and "intimate" to be roughly equivalent. To the extent this raises the question of why "or intimate" appears at all, I suggest that the MPC drafters, and then our General Assembly, anticipated that the word "sexual" could be interpreted to mean only the reproductive organs. Adding "or intimate" guards against that limited interpretation.

Additionally, I find the following MPC commentary helpful in discerning legislative intent.

> Together, the limitation on the range of conduct included in the offense and the requirement of purpose differentiate invasion of personal dignity from the casual expression of affection or approval. The basketball coach who pats his players on the bottom is merely fulfilling a ritual of congratulation. Even if such contact proves unwelcome to the recipient, the actor may not be held liable for this offense.

Maj. Op. at 15 (quoting MPC commentary). The key to understanding the import of the criminalization of the conduct is that it results in an invasion of personal dignity.

The Majority observes that this example is about conduct and not whether a given body part is intimate. True, but the example illustrates that the drafters were concerned with invasions of personal dignity. The neck as a body part is surely not closely associated with personal dignity in the same way as clearer cases like the buttocks. People regularly expose their necks in public and in fact adorn their necks with jewelry; the same cannot be said of the buttocks or breasts under ordinary circumstances. On this score, I agree with Gamby that we should look to the crime of invasion of privacy to determine which body parts the General Assembly intended to qualify as "intimate." That

[3] The five offenses are: rape and related offenses, deviate sexual intercourse by force or imposition, corruption of minors and seduction, sexual assault, and indecent exposure.

offense prohibits photographing or videotaping "intimate parts … that [the] person does not intend to be visible by normal public observation." 18 Pa.C.S. § 7507.1(a)(2). The General Assembly chose to define "intimate part" as "[a]ny part of … the human genitals, pubic area or buttocks; and the nipple of a female breast." *Id*. (section paragraph eliminated). This understanding of "intimate" is consistent with one of the dictionary definitions. *See* Maj. Op. at 12-13 ("Indeed, dictionary definitions over time have consistently and broadly defined the adjective 'intimate' to mean something that is personal and private in nature, commonly associated with sexual relations, and these definitions persist today."). Genitals, the pubic area, buttocks, and the nipple of a female breast are all ordinarily hidden from public view and thus something that most people keep personal and private. The threshold limitation of whether the body part is generally exposed to the public in everyday circumstances implements legislative intent and provides some measure of certainty with respect to the conduct prohibited by statute.

The Majority asserts that these statutes are not in pari materia because they do not relate to the same class of persons or things. While it is true that both crimes are not considered sex crimes so that the proscribed conduct of the perpetrators is different in type, the fundamental concern of both the indecent assault statute and the invasion of privacy crime is identical: criminalizing invasions of personal dignity. The personal dignity interest is protected in both statutes by prohibiting unwarranted intrusions (whether recording or by touch) of intimate parts of the body. Similarly, I disagree that by examining the invasion of privacy statute we necessarily too greatly limit the protections from unwanted touching by importing the circumscribed definition of intimate parts from the invasion of privacy statute. Maj. Op. at 19. We need not express any view on whether

the term "intimate part" for purposes of indecent assault should be read to be identical to the invasion of privacy statute. The definition in the privacy statute gives us insight into the Legislature's view of what constitutes an intimate body part. Clearly, they all share a common characteristic: they are normally covered from public view due to their private and personal nature. The neck does not have that characteristic. Whether the crime of indecent assault extends to body parts not listed by the invasion of privacy statute but share that characteristic, e.g., the inner thigh, is a case for another day.[4]

II.

Finally, I conclude that the Majority's conclusion, driven by interweaving the two distinct parts of the definition of intimate contact,[5] leads to unreasonable results that the

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[4] Contrary to the dissent's suggestion, whether the inner thigh is an intimate body part is not necessarily answered by my proposed definition of that term. To reiterate, that case is for another day as is the classification of the "top of a woman's breast" as hypothesized in the Majority's opinion. Maj. Op. at 26. On the other hand, because the buttocks is subsumed in the Legislature's definition of intimate body part in another statute that protects an individual's dignity from invasion, under my analysis, it would likewise be an intimate body part for the purposes of the offense of indecent assault.

While the approach I favor does not necessarily produce a definitive list of intimate body parts, it does provide an objective starting point for a court's ultimate determination of the question. Nor is it fashion-driven, *id.* at 19, unless the General Assembly's policy considerations in defining an intimate part of the body in a related context can also be classified as fashion-driven. Respectfully, in my view, it is wiser to craft a definition following a related legislative policy determination than to instruct our courts to divine what body parts are common or routinely associated with sexual relations or intimacy.

[5] It is unclear what type of test the Majority is adopting. Some jurisdictions interpreting similar statutes apply an objective "reasonable person" standard. "Common use of the English language would indicate that the term 'intimate parts,' in the context of the statute, refers to any part of the body which a reasonable person would consider private with respect to touching by another." *Parker v. State*, 406 So. 2d 1036, 1039 (Ala. Crim. App. 1981). Other courts incorporate a "community standard." *See Bible v. State*, 982 A.2d 348, 357 (Md. Ct. App. 2009). Others view the inquiry as involving both a subjective and objective component. *State v. Woodley*, 760 P.2d 884, 887 (Or. 1988) ("[T]he part must be subjectively intimate to the person touched, and either known by the accused to be so

General Assembly could not have intended. For ease of reference, I repeat the indecent assault offense text:

> **(a) Offense defined.--**A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

18 Pa.C.S § 3126(a).

This language establishes three basic scenarios for how the crime is committed. First, "a person" (the defendant) is guilty if "the [defendant] has indecent contact with the [victim.]" Second, the defendant is guilty if he or she "causes the [victim] to have indecent contact" with the defendant. Third, a defendant is guilty if he or she causes the victim to

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or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person."). Notably, courts may defer to legislative determinations of what should be viewed as "intimate." *See Bible*, 982 A.2d at 357 (citing Maryland statute criminalizing visual surveillance with prurient intent).

The Majority agrees that courts "sometimes conflate" the conduct with the body part at issue and stresses that it does not consider conduct when assessing whether a part is intimate. Maj. Op. at 23 n.17. If so, it is unclear why the Majority deems it relevant "that an adult does not usually touch or kiss the neck of another adult outside of personal or intimate relationships." *Id*. at 24. That observation considers conduct; moreover, most body parts are not regularly "touch[ed] or kiss[ed]" outside of those relationships. The same goes for "the sexual kissing of a neck." Contrary to the Majority's declaration, I do not suffer from a basic misunderstanding of its opinion. *Id*. at 25. There is no need to discuss conduct at all in determining whether a body part is intimate.

Finally, the Majority cites *State v. Meyrovich*, 129 P.3d 729, 733 (Or. Ct. App. 2006), which concluded that the neck was an intimate body part. Its disclaimer that *Meyrovich* does not "utiliz[e] the same analysis that we embrace today" obscures the fact that the only reason *Meyrovich* concluded that the neck was an intimate body part was because that jurisdiction considers conduct, which, in that case, involved the defendant "sucking on" the victim's neck. 129 P.3d at 731. Thus, the case has no persuasive value whatsoever unless conduct is relevant.

come into contact with seminal fluid, urine or feces. Each scenario requires that the act be done for purposes of arousing sexual desire in the person or the complainant.

The third possibility is not implicated by the Majority's holding, but the first two are because the "indecent contact" definition applies to both. By holding that the neck is an intimate body part, a person is guilty of indecent contact under the second scenario if the perpetrator places a victim's hand against the perpetrator's neck for purposes of sexual gratification. In my view, the General Assembly would not have intended such contact to constitute a sex crime. This "hand to neck" example does not offend the victim's personal dignities.[6] It is in no way comparable to placing the victim's hand on a body part that is normally shielded from public view. Placing a victim's hand on one's buttocks, genitals, pubic area, or female nipple universally offends personal dignities whereas moving a hand to touch the perpetrator's neck does not. Thus, defining intimate body parts as those ordinarily hidden from public view in keeping with the invasion of privacy statute not only reflects legislative intent, it avoids bizarre outcomes. I therefore respectfully dissent.

[6] The Majority steadfastly suggests that this touching would offend a victim's personal dignity but says it need not address this fact-specific circumstance. Maj. Op. at 26. By today's holding, the Majority in fact addresses this fact-specific circumstance. Because by its definition, the neck is an intimate part of the body, if a perpetrator places a victim's hand against the perpetrator's neck for sexual gratification, the sex crime — indecent assault — has been committed.