IN THE COURT OF APPEALS OF IOWA

No. 3-891 / 12-1764
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMISON LEE UNDERWOOD,
Defendant-Appellant.

Appeal from the Iowa District Court for Pocahontas County, Joel E. Swanson, Judge.

Jamison Lee Underwood appeals his conviction for lascivious conduct with a minor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy and Melinda J. Nye, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, and Ann E. Beneke, County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Jamison Lee Underwood appeals his conviction for lascivious conduct with a minor, a serious misdemeanor, in violation of Iowa Code section 709.14 (2011), arguing the evidence was not sufficient to establish that he was "in a position of authority over" the victim, which is necessary to support his conviction. Under the circumstances presented, the jury could reasonably conclude the defendant was in a position of authority over the fifteen-year-old complaining witness. We therefore affirm.

I. Background Facts and Proceedings.

Viewing the evidence in the light most favorable to the conviction, the record shows that during April 2011, fifteen-year-old M.A. lived with her mother, stepfather, and eight siblings. Twenty-five-year-old Underwood was M.A.'s stepfather's friend and coworker. For the three weeks leading up to April 29, 2011, Underwood had slept at M.A.'s home, provided financial assistance to the family,[1] talked to one of M.A.'s brother's ("M") at the behest of the mother, and had given M.A. money.

On Friday evening, April 29, Underwood took M.A.'s sister ("K") prom shopping in Fort Dodge. Underwood and K returned to M.A.'s home at roughly 11:00 p.m. Underwood, K, and M.A. began drinking alcoholic beverages. At one point, Underwood and one of M.A.'s brothers went to a convenience store for more beer and hard lemonade. Underwood showed M.A. where the vodka was and she started taking "shots."

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[1] In April 2011, Underwood wrote checks to the family totaling $980.

After K went to bed at about 11:30, Underwood wanted to go to his house in Pocahontas, Iowa. He carried M.A. to his truck. As they drove, they played "stop signs and bridges," removing articles of clothing each time they stopped at a stop sign or crossed a bridge. Underwood, now only in his boxer shorts, told M.A. she was "sexy." When she denied it, he "grabbed [her] hand and put it on his penis and said if you weren't sexy, why would I be hard."

By the time they reached Pocahontas, M.A. was dressed only in her sports bra, shorts, and underwear. She got out of the truck, went into the house, and fell asleep on the bed in a bedroom on the main floor. She woke up to Underwood "climbing on top of" her. She told Underwood to stop, saying he was "my dad's best friend." M.A. would later testify Underwood inserted his fingers into her vagina; carried her to the bathroom where he placed her in the bathtub with warm water and unsuccessfully attempted vaginal intercourse; carried her downstairs to his bedroom in the basement; kissed her vagina with his mouth; and had vaginal intercourse with her. After the intercourse ended, M.A. got dressed then went out and slept in the truck.

Later, Underwood drove with her to a nearby convenience store, telling her to "act sober" because the store was "cop central." The convenience store clerk recalled Underwood and M.A—Underwood bought cigarettes and pop, then asked if M.A. wanted anything. When she retrieved a bottle of water, the clerk heard Underwood "talking with her about . . . losing too much weight" and "the family had concerns."

M.A. testified Underwood then drove back to M.A.'s house, arriving about 3:00 a.m. M.A.'s mother was up and asked where they had been. M.A. said Underwood was hungry so they went to Kum & Go. M.A. kissed her mother goodnight and went upstairs to her room.

The following Monday at school, M.A. confided in a friend, who "made" her tell K what had happened with Underwood. K in turn summoned their mother and M.A. told her mother what had happened. On Tuesday, M.A. recounted the incident to a family friend who was a mandatory reporter, which led to M.A. speaking with police.

Underwood was charged with two counts of third-degree sexual abuse, one count of assault with intent to commit sexual abuse causing bodily injury, and one count of lascivious conduct with a minor.

At trial, on cross-examination, M.A. testified she had told police that Underwood "kind of was our family's money source." She affirmed that he "basically became part of the family."

Underwood testified in his own defense, admitted drinking with M.A., leaving to get more alcohol, drinking and driving with M.A., "end[ing] up in Pocahontas, and going into his house. He also testified he was intoxicated, and "I assume we went to Kum & Go." He denied any sexual behavior with M.A. He testified M.A. was angry when he told her he could not afford to buy her a cell phone.

Underwood moved for judgment of acquittal on grounds of insufficient evidence, which motion was denied.

Underwood was found guilty on the charge of lascivious conduct with a minor.[2] He filed motions in arrest of judgment and for new trial, asserting there was insufficient evidence he was in a position of authority, as required by Iowa Code section 709.14. Acknowledging that there was no statutory definition of "position of authority," the State argued the facts of the case were sufficient to present a factual issue for the jury, citing the defendant's age, the complainant's age, the relationship between the defendant and the complainant's stepfather, and also noting the defendant was a "household member" and he had physically carried M.A. to the truck and drove her around. The district court denied the motions.

Underwood now appeals, claiming there is insufficient evidence to establish he was in a position of authority over M.A. to sustain the conviction.

II. Scope and Standard of Review.

We review challenges to the sufficiency of evidence for the correction of errors at law. *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We consider all of the record evidence viewed in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence. *Id.*

> We will uphold a verdict if substantial record evidence supports it. We will consider all the evidence presented, not just the inculpatory evidence. Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. Inherent in our standard of review of jury verdicts in criminal cases is the

[2] The jury could not reach a verdict on one count of third-degree sexual abuse, and found the defendant not guilty on the remaining two counts.

> recognition that the jury is free to reject certain evidence, and credit other evidence.

Id. (citations, alterations, and internal quotations marks omitted).

III. Discussion.

A defendant commits lascivious conduct with a minor when a person over eighteen in a "position of authority" over a minor acts "to force, persuade, or coerce a minor, with or without consent, to disrobe or partially disrobe for the purpose of arousing or satisfying the sexual desires of either of them." Iowa Code § 709.14 (2011). As noted by the district court, the Iowa Code does not define the phrase "position of authority."

"In determining the meaning of statutes, our primary goal is to give effect to the intent of the legislature." *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011) (citations and internal quotation marks omitted). We look to the words used in the statute. *Id.* "In the absence of legislative definition, we give words their ordinary meaning." *Id.*

Here the jury was instructed that to find Underwood guilty, the State must prove all of the following elements:

> 1. On or about the 30th day of April, 2011, the defendant, with or without M.A.'s consent, forced, persuaded, or coerced M.A. to disrobe or partially disrobe.
> 2. The defendant did so with the specific intent to arouse or satisfy the sexual desires of the defendant or M.A.
> 3. The defendant was then 18 years of age or older.
> 4. The defendant was in a position of authority over M.A.
> 5. M.A. was then under the age of 16 years.

Underwood challenges the sufficiency of evidence only as to the fourth element—that he was in a position of authority over M.A.

In an earlier version of the code, a person committed third-degree sexual abuse if "the person is in a position of authority over the other participant [who is age fourteen or fifteen] and uses this authority to coerce the other participant to submit." *See State v. Spaulding*, 313 N.W.2d 878, 882 (Iowa 1981). The defendant contended the record "failed to establish the existence of the authority or that it was so used." The *Spaulding* court wrote,

> We also think the evidence was sufficient to show the alleged misuse of parental authority. We view the evidence in the light most favorable to the State and all reasonable inferences to support the conviction are accepted as established. We consider all the evidence. The credibility of the witnesses is for the fact finder. Under this test a jury question was made out. The victim testified her father coerced her into cooperation by threatening to limit her social activities. Though she testified at trial she was not then afraid of her father she also said she was afraid of him at the time of the assault. Defendant's challenge to the victim's testimony as oscillating and uncertain is not well founded. Her vacillation was not from a clouded memory but from her reluctance to testify.

Id. (citations omitted). The court thus looked to the relationship between the participants and the psychological forces at play.

State v. Meyers, 799 N.W.2d 132 (Iowa 2011), is a more recent case concerning the offense of lascivious acts with a minor. A district court found Randy Meyers guilty of lascivious conduct with a minor based on evidence that Meyers had "persuaded [his seventeen-year-old stepdaughter] to disrobe for the purpose of arousing his sexual desires." *Meyers*, 799 N.W.2d at 138. On appeal, this court found the "position of authority" element had been satisfied. *State v. Meyers*, No. 08-1524, 2009 WL 2951481, at *3 (Iowa Ct. App. September 2, 2009). The supreme court granted further review and affirmed our decision. *Meyers*, 799 N.W.2d at 147-48 (affirming the judgment and sentence

of the district court and affirming the decision of the court of appeals); *see also State v*. *Clay*, 824 N.W.2d 488, 494 (Iowa 2012) (noting exercise of discretion to review only some issues raised in briefs and letting stand as the final decision other issues decided by the court of appeals).

Citing a New Hampshire case, *State v. Carter*, 663 A.2d 101 (N.H. 1995),[3] Underwood suggests a proper definition of the phrase requires "the right to expect obedience." He argues all Iowa cases—published and unpublished—discussing the facts surrounding section 709.14 convictions have involved some type of special relationship between the defendant and the victim wherein the defendant was either a parent or authority figure to the victim and "therefore could expect obedience from the victim in some aspect of the victim's life." While the right to expect obedience may well describe a person in a position of authority over another, we conclude the description is under-inclusive of the types of relationships contemplated by the code.

The New Hampshire court in *Carter* used the "common definition of the term 'authority,'" stating "Webster's defines the term broadly: 'power to require and receive submission: the right to expect obedience: superiority derived from a status that carries with it the right to command and give final decisions.'" 663 A.2d at 102 (quoting *Webster's Third New Int'l Dictionary* 146 (unabridged ed. 1961)). The New Hampshire court found that using this common definition, the jury could have concluded the defendant was in a position of authority over the

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[3] In the absence of any statutory definition, the New Hampshire Supreme Court considered the common meaning of the phrase "position of authority over the victim." *See Carter*, 663 A.2d at 102, *abrogated on other grounds by State v. Quintero*, 34 A.3d 612 (N.H. 2011).

victim, noting the defendant was a former teacher of the victim and the victim attended a school adjoining another school at which the defendant was a hall monitor, "and students taking part in [activities at the defendant's school] are subject to the authority of hall monitors there." *Id.*

Though in *Meyers* the supreme court addressed the "against the will" element of sexual abuse, the court's discussion provides general guidance as to the statutory purpose and intent of Iowa's sexual abuse statutes. *See* 799 N.W.2d at 141-45. The court wrote,

> The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts. . . . This concept of imposition has not been narrowed in any way by our legislature over the years, but it remains at the heart of the statute to capture both case-specific circumstances of an "actual failure of consent" as well as circumstances when the legislature has declared "consent as incompetent" or nonexistent.

Id. at 142-43. In determining if a sex act is nonconsensual, "the mental state of the victim" is a proper circumstance to consider, as is the age of the victim, as well as other psychological circumstances. *See id*. at 145 (noting also "contract principles applicable to finding adequate agreement between people in other situations may aid in understanding whether there has been an equal agreement to sex").

In prohibiting a person in a position of authority over a minor to force, persuade, or coerce a minor, with or without consent, to disrobe, the legislature has declared "consent as incompetent" or nonexistent. *See id.* at 143. In *State v*. *Chamberlain*, No. 11-1077, 2012 WL 3195911 (Iowa Ct. App. Aug. 8, 2012), we concluded a resource teacher and volleyball coach was "in a position of

authority" for purposes of section 709.14. We stated that although our statute does not define "position of authority,"[4] "the jury did not need a statutory definition to find that Chamberlin was in a position of authority vis-a-vis [the victim], as the case involved a straightforward application of a commonly understood phrase." *Chamberlain*, 2012 WL 3195911, at *1.

Underwood's suggestion that a position of authority is confined to those relationships where one has the *right* to expect obedience ignores the common understanding that one could be found to be in a position of authority where the person has "*the power* . . . to receive submission." *Webster's Third New Int'l Dictionary* 146. Applying the common definition of the phrase, there is substantial evidence from which the jury could find that Underwood was in a position of authority over M.A.

Unlike the district court, we are not convinced Underwood's activities during the drive with M.A. aid in our determination of the issue. However, we conclude the jury could reasonably find Underwood was in a position of authority. Underwood was a trusted family friend and M.A.'s stepfather's best friend; he contributed monies to the family when they were in dire need; he also provided

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[4]Some states have adopted statutory definitions of "position of authority." For example, Minnesota defines "position of authority" as including, but not limited to:

> any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.

Minn. Stat. § 609.341(10).

The Wyoming statute defines the phrase to mean "that position occupied by a parent, guardian, relative, household member, teacher, employer, custodian or any other person who, by reason of his position, is able to exercise significant influence over a person." Wyo. Stat. § 6–2–301(a)(iv).

transportation to members of the family on occasion; he spent many nights sleeping at M.A.'s family residence; and once he was asked by M.A.'s mother to talk to M.A.'s brother about his behavior.[5] In his own words, Underwood told M.A., "trust me" in his effort to exercise control and authority over M.A. We conclude substantial evidence exists that Underwood had become a de facto adult member of the family and in a position of authority over M.A.

AFFIRMED.

[5] The evidence reflects that Underwood provided transportation to K for prom shopping in Fort Dodge; to M.A.'s brother in traveling to a convenience store for liquor; and ultimately to M.A.