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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2203

Timothy Joseph Crosby, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 20, 2012
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-09-15093

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Harten, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

BJORKMAN, Judge

Appellant challenges the district court's denial of postconviction relief, arguing that his guilty plea to using a minor in a sexual performance was not accurate and therefore withdrawal of that plea is necessary to correct a manifest injustice. In a pro se supplemental brief, appellant asserts additional challenges to his guilty plea and his civil commitment. We affirm.

FACTS

In late 2009, appellant Timothy Crosby pleaded guilty to using a minor in a sexual performance and received a stayed sentence of 24 months' imprisonment. In June 2010, the district court revoked Crosby's probation, and we reversed the revocation. *State v. Crosby*, No. A10-1460 (Minn. App. Apr. 26, 2011). Crosby subsequently petitioned for postconviction relief, arguing that he should be permitted to withdraw his guilty plea as inaccurate because it lacked a sufficient factual basis. The district court denied the petition, and this appeal follows.

D E C I S I O N

I. Crosby's guilty plea was accurate.

A defendant does not have an absolute right to withdraw a guilty plea. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). After sentencing, a defendant may withdraw a guilty plea only if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A guilty plea is valid if it is voluntary,

accurate, and intelligent. *Perkins*, 559 N.W.2d at 688. The validity of a guilty plea is a question of law, which we review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

For a guilty plea to be accurate, a factual basis must be established on the record showing that the defendant's conduct meets all elements of the charge to which he is pleading guilty. *State v. Iverson*, 664 N.W.2d 346, 349-50 (Minn. 2003). The elements of using a minor in a sexual performance are set forth in Minn. Stat. § 617.246, subd. 2 (2008):

> It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance or a pornographic work.

The phrase "sexual performance" means "any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that uses a minor to depict actual or simulated sexual conduct." Minn. Stat. § 617.246, subd. 1(d) (2008).

In pleading guilty to this offense, Crosby testified that in April 2009, he took two women, one 24 years old and the other 17 years old, to a hotel where he had rented a room for the evening. Crosby admitted that he "want[ed] them to put on a show for [him]," that he "offered them money to do so," and that "they perform[ed] sexual acts on each other while [he] watched them" for his own sexual gratification. He also admitted involving the same women in a similar incident in January 2009 and that "on that

occasion, [he] w[as] also an audience watching these two women perform sexual acts on each other while [he] gratified [him]self."

Crosby argues that these facts fail to satisfy the "sexual performance" element of the offense because they do not establish (1) that there was an "audience" or (2) that he knew or had reason to know that a minor was participating. Because Crosby did not present the second issue to the district court, he has waived the argument and we decline to address it. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) ("It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." (quotation omitted)).

The crux of Crosby's argument is that he, as the sole observer of the sexual exhibitions in question, cannot constitute an "audience" within the meaning of Minn. Stat. § 617.246, subd. 1(d). The interpretation and application of a statute to established facts presents a question of law, which we review de novo. *State v. Marinaro*, 768 N.W.2d 393, 397 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009). The goal of statutory interpretation and construction "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). We interpret statutory words and phrases "according to their common and approved usage" and presume that the legislature did not intend a result that is absurd or unreasonable. Minn. Stat. §§ 645.08(1), .17(1) (2010). We also do not examine different provisions in isolation but consider the statute as a whole, interpreting words and sentences in light of their context. *State v. Gaiovnik*, 794 N.W.2d 643, 647 (Minn. 2011). Only if a statute is ambiguous will we engage in

statutory construction or apply the rule of lenity. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009).

The word audience has more than one dictionary definition. *See State v. Carufel*, 783 N.W.2d 539, 542 (Minn. 2010) (stating that dictionary definitions may indicate plain and ordinary meaning). One definition refers to a group or set of spectators or listeners. *American Heritage Dictionary* 117 (4th ed. 2006); *Webster's Third New International Dictionary* 142 (1993). But the word audience derives from the Latin word *audire*, which means "to hear," so dictionaries typically also include a definition that refers broadly to the act of hearing or attending. *See American Heritage Dictionary* 117; *Webster's Third New International Dictionary* 142. This definition of the word audience encompasses a single observer or multiple observers.

Crosby contends that these different definitions render the word ambiguous. *See Carufel*, 783 N.W.2d at 542 (stating that a statute is ambiguous if its language "is susceptible to more than one reasonable interpretation"). We disagree. First, the varying dictionary definitions are not logically inconsistent. A single observer and a group of observers both are types of audiences; the word may be applied equally to a single observer or to members of a group of observers without any logical inconsistency. *See Taylor v. LSI Corp. of Am.*, 796 N.W.2d 153, 156 (Minn. 2011) (concluding that statutory language was "unambiguous because it does not lend itself to multiple interpretations or logical inconsistencies in its application").[1] Second, application of the statute to an

[1] We note that courts in other states addressing similar statutes apply the term audience to a single observer. *See Bishop v. State*, 46 So.3d 75, 79 (Fla. Dist. Ct. App. 2010)

audience of one is consistent with common sense. A single patron in a movie theater would say that he was the only person in the audience, not that there was no audience. Moreover, it would be unreasonable to interpret the statute to apply only to groups of observers, and presumably to each individual member of such a group, but not to apply to the individual who solicits and then observes a minor's participation in a sexual exhibition. *See* Minn. Stat. § 645.17(1) (stating the presumption that the legislature does not intend absurd or unreasonable results).

Because nothing in Minn. Stat. § 617.246 (2008) limits the word audience to a specific number of people,[2] we conclude that the only reasonable interpretation of the statute prohibits using a minor in a sexual performance before any size of audience—one person or a group.[3] The facts Crosby admitted amply establish this element of the offense.

II. Crosby's pro se arguments lack merit.

In a pro se supplemental brief, Crosby argues that he should be permitted to withdraw his plea because: (1) he was confused, depressed, and stressed at the time he

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(holding that "[a]n 'audience' can consist of a single individual and that individual can be the defendant"); *Alcorn v. Commonwealth*, 910 S.W.2d 716, 717 (Ky. Ct. App. 1995) (holding that one person can constitute an "audience"), *review denied*, (Ky. Dec. 14, 1995); *State v. George*, 717 S.W.2d 857, 859 (Mo. Ct. App. 1986) (holding that "performance" required an "audience," and that defendant was director and audience of the sexual performance).

[2] In this respect, Minn. Stat. § 617.246 is distinct from the statute at issue in *Graham v. State*, 861 S.W.2d 299 (Ark. 1993), on which Crosby relies. The Arkansas statute expressly required an audience of two or more. *See Graham*, 861 S.W.2d at 302.

[3] Because the statute is unambiguous, we need not apply the rule of lenity or address the statute's legislative history, as Crosby urges.

entered his guilty plea; (2) he did not understand the charges against him and was pressured to plead guilty; (3) the use of leading questions during his guilty plea was unfair and confusing; and (4) the two women involved consented. Crosby also complains about his civil commitment and the termination of his parental rights.

We first note that Crosby did not present these arguments to the district court and does not support them with citation to legal authority. Accordingly, he has waived these arguments. *See Azure*, 700 N.W.2d at 447 (stating that arguments may not be raised for first time on appeal); *State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (deeming assertions of error waived for failure to provide supporting argument or authority). Nonetheless, we briefly address Crosby's pro se arguments in the interests of justice and judicial economy. Minn. R. Crim. P. 28.02, subd. 11; *see* Minn. R. Civ. App. 103.04.

Our careful review of the record reveals that Crosby's guilty plea was voluntary and intelligent. He stated on the record at the time of the guilty plea that he understood the charges and the state's evidence against him, that his medications and mental-health issues did not affect his ability to understanding the proceedings, that he understood the rights he was relinquishing by pleading guilty, and that no one was forcing him or pressuring him to plead guilty. *See State v. Ecker*, 524 N.W.2d 712, 719 (Minn. 1994) (affirming denial of plea withdrawal based on claim of involuntariness when the record showed that the defendant repeatedly stated that he was making his own decision). Crosby's consent argument fails because the statute specifically excludes consent as a defense to using a minor in a sexual performance. *See* Minn. Stat. § 617.246, subd. 5. And Crosby's civil commitment and termination of parental rights are separate civil

proceedings to which his guilty plea could potentially be relevant but for which he cannot seek relief through the postconviction process.[4]

Affirmed.

[4] We also note that Crosby has initiated a separate appeal challenging his civil commitment. *In re Civil Commitment of Crosby*, No. A12-1224.