IN THE COURT OF APPEALS OF IOWA

No. 0-981 / 10-0787
Filed April 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN COLLINS ANDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, District Associate Judge.

A defendant appeals his judgment and sentence for exploitation of a minor, contending there was insufficient evidence to support the district court's finding of guilt. **AFFIRMED.**

Michael O. Carpenter of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Allen Cook, County Attorney, and Patricia Notch, Assistant County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

John Collins Anderson appeals his judgment and sentence for exploitation of a minor. He contends there was insufficient evidence to support the district court's finding of guilt.

I. Background Facts and Proceedings

The Ottumwa Police Department executed a search warrant at Anderson's home and seized a brochure containing several photographs of semi-nude children on a beach. The brochure advertised the sale of DVDs that included footage of naked or topless girls.

The State charged Anderson with two counts of sexual exploitation of a minor. One count related to the brochure and a second count related to images found on Anderson's computer.

Anderson filed a motion to adjudicate law points on the count relating to the brochure. He asserted the brochure did not violate the statutory definition of exploitation of a minor because, in his view, it contained "mere nudity" rather than nudity "for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the nude minor." *See* Iowa Code § 728.12 (2005) (defining sexual exploitation of a minor); *see also id.* § 728.1(7)(g) (defining "prohibited sexual act," an element of the offense of sexual exploitation of a minor). The district court concluded otherwise, and the Iowa Supreme Court declined to grant an application for interlocutory appeal of this ruling.

Prior to trial, Anderson and the State agreed the count relating to the computer images would be dismissed and the count relating to the brochure would proceed to a bench trial on the minutes of testimony. After reviewing the

minutes, the district court found Anderson guilty on the second count of sexual exploitation of a minor and, following sentencing, dismissed the first count. Anderson appealed.

II. Analysis

Iowa Code section 728.12(3) defines sexual exploitation of a minor as follows:

> It shall be unlawful to knowingly purchase or possess a negative, slide, book, magazine, computer, computer disk, or other print of visual medium, or an electronic, magnetic, or optical storage system, or any other type of storage system which *depicts a minor engaging in a prohibited sexual act* or the simulation of a prohibited sexual act.

(Emphasis added). "Prohibited sexual act" includes "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the nude minor." *Id.* § 728.1(7)(g).

Anderson acknowledges the brochure is "an advertisement for videos featuring nude children" and "the intended audience for this brochure is individuals who are sexually aroused by nude children." He maintains, however, that "[u]nless the constituent photographs are themselves 'depictions . . . for the purpose of arousing or satisfying the sexual desire' the brochure is not contraband." *See id*. In his view, the pictures in the brochure were not such depictions and the district court accordingly erred in finding him guilty of sexual exploitation of a minor.

Anderson's argument is essentially a challenge to the sufficiency of the evidence supporting the district court's fact-findings. Our review of those findings

is for substantial evidence. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We are obligated to view the findings in a light most favorable to the State. *Id.*

The district court made the following pertinent findings:

> The [brochure] contained photos of minor children partially clothed, nearly all of them topless in a beach setting. The paper also had an ad for a video called Naked Lolitas, alleged to be a video of two sisters aged 12 and 13. The ad for the video was called Kid Carnaval.

The court then determined:

> When combining the nature of these photographs with the text accompanying them, it's clear that the purpose of the pictures and text is to encourage individuals who enjoy voyeuristic semi-nude pictures of minor girls to buy these videos. The text indicates that two sisters ages 12 and 13 are contained in the video called "Naked Lolita's." The ad for the video is called Kid Carnival [sic]. . . . The common-sense view, which the court as a fact-finder is entitled to utilize, *see* Iowa Jury Instruction Number 100.7, is that the purpose of taking these photos and in possessing these photos is to elicit a sexual response.

Cognizant of our standard of review, we are persuaded that the record contains substantial evidence to support the district court's findings.[1] Several pictures showed children's bare breasts. One showed a child's bare buttocks. *See State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996) ("The common meaning of 'nudity' does not require total nakedness."), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306 (Iowa 2000); *see also United States v. Horn*, 187 F.3d 781, 789–90 (8th Cir. 1999) (noting that reasonable jury could conclude

[1] In determining whether there is substantial evidence to support the district court's findings, we have declined the State's invitation to consider the minutes of testimony relating to the dismissed count. Defense counsel moved to sever the two counts, a motion that was denied. Although he did not move to have the minutes redacted after it became clear that the first count would be dismissed, we believe the district court correctly focused only on those minutes of testimony that specifically related to the brochure.

exhibition of pubic area of children playing on beach was lascivious despite the fact that girls were wearing swimsuit bottoms). Below these pictures was the title "Kids Carnaval BV 136," described as a DVD that will be included with a minimum purchase of other advertised DVDs. The other DVDs listed in the brochure included the one referenced by the district court. While Anderson asserts that the district court placed too much emphasis on the accompanying text, we believe a reasonable fact-finder could have used the text to place the pictures of semi-nude children in context. *See United States v. Arvin*, 900 F.2d 1385, 1387 (9th Cir. 1990) (noting pictures of naked prepubescent girls were captioned "Lolita-Sex," "Skoleborn-School Children," and "Little Girls F-k too"). Additionally, as the district court noted, a reasonable fact-finder was entitled to use common sense in deciding whether the photographs satisfied the statutory standard. *See Commonwealth v. Davidson*, 938 A.2d 198, 214 (Pa. 2007) ("[C]ommon sense and human experience dictate that an individual of ordinary intelligence, not a mind reader or a genius, can identify whether a photograph of a nude child depicts 'nudity' for the purpose of sexual stimulation or gratification.").

Having found substantial evidence to support the district court's findings, we conclude the court did not err in adjudging Anderson guilty of sexual exploitation of a minor. In reaching this conclusion, we have not considered certain factors cited by federal courts in evaluating a comparable federal crime. *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (articulating six factors in determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area"). In our view, we need look no

further than the express language of sections 728.12(3) and 728.1(7)(g) as applied to the brochure to affirm the court's finding of guilt.

AFFIRMED.