IN THE COURT OF APPEALS OF IOWA

No. 2-461 / 11-1077
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY RAY CHAMBERLIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Jones County, Sean W. McPartland, Judge.

Jeremy Chamberlin appeals his judgment and sentences for one count of lascivious conduct with a minor and three counts of dissemination of obscene material to a minor. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Phil Parsons, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Jeremy Chamberlin, a high school resource teacher and volleyball coach, began an inappropriate relationship with fourteen-year-old K.W., which included requests for sexually explicit photographs, transmittal of sexually explicit photographs and text messages, and kissing and touching. Chamberlin was arrested and charged with two counts of lascivious acts with a minor, three counts of dissemination of obscene materials to a minor, and one count of sexual exploitation of a student by a school employee. The jury found Chamberlin guilty on all counts and the district court imposed sentence, after referring to information in a presentence investigation report.

On appeal, Chamberlin asserts (1) there was insufficient evidence to establish he was in a position of authority over K.W. on the first of two lascivious acts counts, (2) there was insufficient evidence to establish the pictures he texted K.W. were obscene, and (3) the district court improperly considered an unproven offense in sentencing him.

Our review of the sufficiency-of-the-evidence challenges is for errors of law, with the findings of guilt binding us if supported by substantial evidence. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). We review sentencing decisions that are within statutory limits for an abuse of discretion. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

I. Lascivious Conduct with a Minor

The jury was instructed that to find Chamberlin guilty of the first count of lascivious conduct with a minor, the State would have to prove several elements, including that "[a]t the time of the conduct, the defendant was 18 years of age or

older and was in a position of authority over [K.W.]." Chamberlin argues his position as K.W.'s resource teacher and volleyball coach did not give him authority over her or, alternately, he did not have authority over her at the time she sent him a sexually explicit photograph.

Our statute, unlike the statutes of other states, *see, e.g.*, Minn. Stat. § 609.341(10)(2009); W.S. § 6-2-301(a)(vi)(2009),[1] does not define "position of authority." However, in our view, the jury did not need a statutory definition to find that Chamberlin was in a position of authority vis-à-vis K.W., as the case involved a straightforward application of a commonly understood phrase.

Jurors could have found Chamberlin was in a position of authority over K.W. based on the undisputed fact that Chamberlin was K.W.'s resource teacher and her volleyball coach. As resource teacher, he spent thirty minutes a day advising and helping her with algebra. As volleyball coach, he spent at least two hours a day with her during practices and additional time during the thirty seasonal games.

In addition to Chamberlin's job titles, the jurors could have relied on several children's testimony in finding he exercised a position of authority over

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[1] The Minnesota statute 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). A proposed amendment in 2011 sought to change the latter phrase to "at the time of *or within the 24 months immediately preceding* the act." *See* H.F. 636, 2011 Leg., 87th Sess. (Minn 2011) (emphasis added). It does not appear that amendment was adopted.

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. Ann. § 6-2-301(a)(iv).

K.W. K.W. testified that when she sent Chamberlin an explicit photograph of herself, she felt she "really had no choice" because "he started like saying that he'd make me like do stuff in person or at school or something." She said she sent one picture "to protect" herself. She stated she would "rather just send one and not hav[e] something happen to" her. In her view, she "felt kind of helpless." *See Scadden v. State*, 732 P.2d 1036, 1042 (Wyo. 1987) (noting a "teacher or coach is vested with power by a grant from society" and stating "[t]his case involves a very young woman, then in high school, who was in large part controlled by the attention and demands of appellant as her teacher, coach and confidant"). K.W.'s friends agreed with her assessment of Chamberlin. One testified Chamberlin was "always somebody that you could trust if you had a problem to go talk to. And then you see . . . these messages being sent . . . and now you can't [trust him] anymore." Another, who saw one of the pictures that Chamberlin sent K.W., testified, "Well, he's a teacher and, you know, he's supposed to be a role model for us, and . . . he's not doing a good job."

This testimony, combined with Chamberlin's job description, amounts to more than substantial evidence supporting the "position of authority" element, notwithstanding that the picture was sent after school hours. While Chamberlin deems the timing of the transmittal important, our statute does not. *See* Iowa Code § 709.14 (2009). Section 709.14 simply states it "is unlawful for a person over eighteen years of age who is in a position of authority over a minor 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." Nothing in the statute requires the conduct to occur at the place that is the source of the defendant's authority.

As substantial evidence supports the jury's finding that Chamberlin was in a position of authority over K.W., we affirm the jury's finding of guilt on the first count of lascivious conduct with a minor.

II. Dissemination of Obscene Material to a Minor

To find Chamberlin guilty of the three counts of dissemination of obscene material to a minor, the jury was instructed the State would have to prove several elements, including his dissemination or exhibition of "obscene material." *See id* § 728.2.

Chamberlin argues the State failed to prove the pictures he sent K.W. were obscene. He notes the pictures themselves were not introduced into evidence, as they had been deleted from Chamberlin's and K.W.'s phones. As a result, he points out that the only evidence of the pictures came in the form of children's descriptions and most of those descriptions did not mention an erect penis. In Chamberlin's view, "[T]his case presents a situation where the Court can, and should, find as a matter of law that a depiction of a non-erect penis presented into evidence solely through testimony of lay witnesses cannot be obscene material." The State counters that, just as murder may be proven without a weapon, proof of this crime does not require the pictures. Additionally, the State asserts that the "turgidity" of the penis mattered little in the analysis of whether the pictures were obscene. We agree with the State.

The jury was instructed "obscene material" is

> any material depicting or describing genitals, sex acts, or masturbation which the average person, taking the material as a whole and applying contemporary standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive, and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.
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> Mere nudity does not constitute obscenity. In order for the depiction of a person's genitals to be obscene, an average person applying contemporary community standards with respect to what is suitable material for minors must find the material is patently offensive, appeals to the prurient interest, and lacks serious literary, scientific, political, or artistic value.
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> "Prurient interest" is defined as a shameful or morbid interest in nudity, sex, or excretion.

The jury was also told that in determining community standards, "you are entitled to draw on your own knowledge of the views of the average person in the community or vicinity from which you come to make your determination, within the parameters of the definitions you have been given."

The jury heard descriptions of the pictures from more than one witness. *See State v. Keene*, 630 N.W.2d 579, 582 (Iowa 2001) ("Obscene material can be described in words, just as it can be observed."). These descriptions left no doubt the pictures Chamberlin disseminated were of his penis. While the children disagreed on whether Chamberlin's penis was erect, the jury was free to "believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

This was particularly true where the jury was told to apply community standards by examining "what is suitable material for minors." *See State v. Canal*, 773 N.W.2d 528, 531 (Iowa 2009) ("[T]he obscenity test as to minors is different from the test as to adults."). Under this standard, the jury reasonably

could have found that a picture of a non-erect penis disseminated to a fourteen-year-old was "obscene material." *See State v. Trochinski*, 644 N.W.2d 891, 903 (Wis. 2002) (applying contemporary community standards to find a non-erect penis qualified as obscene material).

We recognize that in *Canal*, a case involving similar facts, the court was faced with a picture of an erect penis. 773 N.W.2d at 532 (affirming jury's finding of "obscene material" where an eighteen-year-old boy emailed a photo of his face and erect penis to a fourteen-year-old girl with a message, "I love you"). However, the court did not focus on this aspect of the photograph in upholding the jury's finding that the photograph was obscene. Instead, the court cited the "community standards" the jury was required to apply and the court's restrictive standard of review. *Id*. *Canal*, therefore, does not require a different result.

Our determination that substantial evidence supports the jury's finding of obscenity is bolstered by the context in which the pictures were sent. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 427 (1992) (Stevens, J. concurring) ("Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience."). Chamberlin was holding sexually-charged texting conversations with the minor when he transmitted the photos to her. *See Miller v. California*, 413 U.S. 15, 24 (1973) (stating to be legally obscene, the material at issue must "depict or describe sexual conduct"). Jurors reasonably could have found from these text messages that the pictures reflected a "prurient interest," were "patently offensive," and lacked "serious literary, scientific, political or artistic value."

In sum, the jury was free to determine, under its own community standards applicable to minors, that the photographs Chamberlin sent to K.W. were obscene. Accordingly, we affirm the jury's findings of guilt on the obscenity counts.

III. Consideration of Unproven or Unprosecuted Offense

Chamberlin finally contends the district court impermissibly referred to an unproven charge in sentencing him. *See Formaro*, 638 N.W.2d at 725 ("It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses."). We agree.

The district court stated:

> The reasons and facts supporting the disposition . . . are adequately set forth in the presentence investigation report. I find that the reasons and facts supporting the disposition are and include *the Defendant's prior criminal history, which includes the conviction for an assault following allegations of similar behavior, although the conviction and the plea was only for a simple assault in that earlier matter*; the Defendant's failure to take responsibility for his actions; the Defendant's position of authority over the victim. This sentence will hold the Defendant accountable for his actions and provide the appropriate level of protections for the community.

(Emphasis added.) The court made reference to a prior assault conviction but, more significantly, to a charge on which Chamberlin was not convicted. The court relied upon this specific, unproven charge in sentencing Chamberlin. Accordingly, we vacate Chamberlin's sentences and remand for resentencing.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.