STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0830

State of Minnesota,
Respondent,

vs.

Daniel Joseph Decker,
Appellant.

Filed May 8, 2017
Affirmed
Jesson, Judge

Steele County District Court
File No. 74-CR-14-1843

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

Dan McIntosh, Steele County Attorney, Laura E. Isenor, Assistant County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Smith, John, Judge.*

* 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

JESSON, Judge

Appellant Daniel Joseph Decker challenges his convictions of fifth-degree criminal sexual conduct and indecent exposure, arguing that his act of sending a photograph of his erect penis to the 14-year-old victim via Facebook Messenger did not constitute live exhibition or lewd exposure of his private parts in the victim's presence. Because the photograph was sent in the context of a continuing online conversation between Decker and the victim, we conclude that the offense was committed in the presence of the victim, and we affirm.

FACTS

During the summer of 2014, when M.J. was 14 years old, she was an occasional babysitter for a couple in their home in Owatonna. During that time, Decker, a friend of the couple, also moved into their home. One late evening in September, M.J. was spending the night at a friend's house, and at about 1:00 a.m., the girls were both logged into Facebook on their own devices. Decker, who was a Facebook friend of M.J.'s, contacted her by Facebook Messenger, an application on her cell phone. He sent her a video clip of himself talking to her. In the video clip, he asked, "What's up? Shouldn't you be in bed by now? Ah, I'm just kicking it, fixing to go to sleep." He winked at the camera. She responded by sending a text message back. The following text conversation then took place on Facebook Messenger:

MJ @ 12:51 a.m.: im not sleeping

Decker @ 12:52 a.m.: Why not

MJ @ 12:53 a.m.: im at a friends

Decker @ 12:53 a.m.: What y'all doing
Being good

MJ @ 12:53 a.m.: haha f--k no

Decker @ 12:54 a.m.: I already know that me ether [sic]

MJ @ 12:54 a.m.: haha yeah

Decker @ 12:55 a.m.: Ok we'll imam [sic] finished what I just started before I said hey

MJ @ 12:58 a.m.: what do you mean? [smiley face emoji]

Decker @ 12:59 a.m.: Just kinda [sic] a nightly ritual to stress before sleep

MJ @ 1:00 a.m.: what is?

Decker @ 1:00 a.m.: What I do before I sleep every night

MJ @ 1:01 a.m.: well what do you do?

Decker @ 1:02 a.m.: It's embarrassing kinda [sic]

M.J. testified that she thought that Decker meant that he was smoking marijuana before bed.

At 1:03 a.m., one minute after his last remark on Facebook Messenger, Decker sent M.J. a photo of his erect penis. At 1:04 a.m., he sent another message to M.J.:

F--k nooopopooool sh-t
My bad damn dn
How do I delete damn
Sorry pops that was the phones fault
This g-d d-mn phone I'm so sorry was
chatting with an old friend sorry!!!!!.

M.J. then exited the application so she could stop communicating with him. When M.J. did not respond, Decker messaged her at 1:13 a.m.:

"You pissed? That was I total bad mistake wrong a-- picture"

No further conversation occurred.

M.J.'s sister immediately found out about the incident from a friend and told their mother, who picked M.J. up. She took M.J. to the police station, where M.J. told police what had just happened. Decker did not contact her again after the incident.

An Owatonna police officer collected the video, the messages, and the photograph from M.J.'s phone. He eventually located Decker and seized two of his cell phones for evidence. A forensic investigator did not locate the messages sent to M.J. on the phones. But he found five photos, similar to the one sent to M.J. of an erect penis, with the same background and dark shorts pulled down, which were taken at 12:49 a.m. the day of the incident.

The state charged Decker with fifth-degree criminal sexual conduct and indecent exposure. *See* Minn. Stat. §§ 609.3451, subd. 1, 617.23, subd. 1 (2014). A jury found him guilty of both counts. The district court sentenced him on the fifth-degree criminal-sexual conduct conviction to 365 days in jail, with 305 days stayed. This appeal follows.

D E C I S I O N

Decker challenges the sufficiency of the evidence to sustain his convictions. In reviewing a claim of insufficient evidence, we examine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to allow the jury to convict the defendant. *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012). We will not overturn a

verdict if, giving due regard to the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). But we review questions of statutory interpretation de novo. *State v. Struzyk*, 869 N.W.2d 280, 285 (Minn. 2015).

I. Decker's online presence with the complainant sufficiently sustains his conviction of fifth-degree criminal sexual conduct.

Decker was convicted of fifth-degree criminal sexual conduct in violation of Minnesota Statutes section 609.3451, subdivision 1(2) (2014). A conviction under that subdivision requires the state to prove beyond a reasonable doubt that the actor "engage[d] in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451, subd. 1(2). Decker argues that the evidence was insufficient to sustain his conviction of fifth-degree criminal sexual conduct because this subdivision requires that the actor must be physically present in the same location with the minor, not merely present via Facebook Messenger.

Examining this issue requires this court to discern the meaning of subdivision 1(2). "The object of statutory interpretation is to ascertain and effectuate the Legislature's intent." *Struzyk*, 869 N.W.2d at 284. If the legislature's intent is clear from the plain and unambiguous language of the statute, appellate courts interpret the statute according to its plain meaning. *Id.* at 284-85. In so doing, we accord words and phrases their plain and ordinary meaning. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003); *see also* Minn. Stat. § 645.08(1) (2014) (stating that statutory phrases are construed according to their

common and approved usage). Plain meaning may be determined with the aid of dictionary definitions. *See State v. Hartmann*, 700 N.W.2d 449, 453-54 (Minn. 2005). If the statute is susceptible to more than one interpretation, however, it is ambiguous, and a reviewing court may use the canons of statutory interpretation to discern legislative intent. *Struzyk*, 869 N.W.2d at 285. This may include the necessity and occasion for the law, the mischief to be remedied, and the object to be attained. Minn. Stat. § 645.16 (2014). In construing penal statutes, this court resolves any reasonable doubt concerning legislative intent in favor of the defendant. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). But strict construction does not require the court to assign the narrowest possible statutory interpretation. *Koenig*, 666 N.W.2d at 372-73.

Decker argues that when he sent the photo to M.J., he was not "present" with her, as required for a conviction of fifth-degree criminal sexual conduct, because she was not in the same physical location as he was. Because Minnesota Statutes section 609.3451 does not contain a definition of "present," we examine dictionary definitions, the evolution of the statute prohibiting fifth-degree criminal sexual conduct, recent caselaw interpreting the statute, and the policy behind the statute.

"Presence" has been defined as "[n]ow existing; at hand" and "[i]n attendance; not elsewhere." *Black's Law Dictionary* 1374 (10th ed. 2014). It has also been defined as "[t]he state or fact of being present; current existence or occurrence," as well as "[i]mmediate proximity in time or space." *The American Heritage Dictionary of the English Language* 1432 (3d ed. 1992). But these definitions, while helpful, do not resolve the issue of whether Decker was required to be physically present with the minor for a

conviction of fifth-degree criminal sexual conduct, or whether the statutory requirement of being "present" was satisfied with his online presence with M.J. Because the statute is subject to more than one reasonable interpretation, it is ambiguous, and we therefore examine legislative intent to discern the meaning of "present." *Struzyk*, 869 N.W.2d at 285; *see* Minn. Stat. § 645.16.[1]

In so doing, we consider the evolution of the law relating to fifth-degree criminal sexual conduct in Minnesota. *See id*. (allowing consideration of "the former law, if any, including other laws upon the same or similar subjects"). We note that when the fifth-degree-criminal-sexual-conduct statute was first enacted in 1988, it defined the prohibited conduct as "nonconsensual sexual contact," which required physical presence because it referred to touching. 1988 Minn. Laws ch. 529, § 2, at 431-32. *See* Minn. Stat. § 609.341, subd. 11(a)(i), (iv) (1988) (defining "sexual contact" as "touching by the actor of the complainant's intimate parts" or "touching of the clothing covering the immediate area of [those] parts"). In 1990, the legislature amended the statute to also prohibit intentional

[1] We note that courts in other jurisdictions have not uniformly resolved this issue. Some courts have required that the actor be physically present with the victim to convict of similar crimes. *See, e.g.*, *United States v. Miller*, 67 M.J. 87, 88-89 (C.A.A.F. 2008) (concluding that regarding the offense of taking liberties with a child, which required that the accused commit the act "in the presence" of the child, means that "the liberties must be taken *in the physical presence of the child*" and live-feed broadcast by web camera was not sufficient to meet this requirement) (quotation omitted)). Cases from other jurisdictions support a conclusion that "presence" does not necessarily mean "physical presence." *See, e.g.*, *Rabuck v. State*, 129 P.3d 861, 867-68 (Wyo. 2006) (holding that a defendant's conduct of viewing minors undressing via video camera satisfied element in statute prohibiting taking indecent liberties "with" a minor because defendant was constructively present while victims were undressing).

removal of the complainant's undergarments with sexual or aggressive intent. *See* 1990 Minn. Laws ch. 492, § 1, at 1232. But the legislature amended the statute more substantially in 1995, adding a new subsection that made it a crime to engage in masturbation or lewd exhibition of the genitals in the presence of a minor under 16. 1995 Minn. Laws ch. 226, art. 2, § 19, at 1789. The current version of the statute reflects the 1995 amendment. Minn. Stat. § 609.3451, subd. 1(2). Thus, for a conviction under that subsection, it is no longer required that the actor touch the complainant or the complainant's garments. *See id.*

"An amendment to a statute is normally presumed to change the law." *State v. Tanksley*, 809 N.W.2d 706, 711 n.5 (Minn. 2012) (quotation omitted). Because the legislature has amended the law to include a subsection that does not require touching for a conviction of fifth-degree criminal sexual conduct, we may presume that it intended to expand the definition of conduct that may support a conviction of that offense. *See id.* And that expansion supports a broader definition of "present."

This interpretation is consistent with the Minnesota Supreme Court's decision in *State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003). In *Stevenson*, the supreme court interpreted the phrase in subsection 2, "in the presence of a minor," to require "only . . . that the accused's conduct be reasonably capable of being viewed by a minor." *Id.* at 239-40. Thus, the supreme court upheld the defendant's conviction of attempted fifth-degree criminal sexual conduct based on his act of masturbating in a truck parked near a playground where children were playing, even though the children did not actually view the defendant's conduct. *Id.* at 237.

The public policy behind section 609.3451 also supports our conclusion that an actor's electronic communication, if other statutory requirements are proved beyond a reasonable doubt, may form the basis of a conviction of fifth-degree criminal sexual conduct. *See* Minn. Stat. § 645.16(1) (stating that in examining legislative intent, a court may consider the public policy behind the law, including the occasion and necessity for the law). Noncontact sex offenses with a child may act as a precursor to actual sexual contact or change a child's views of sex and sexual relationships. Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 Wash. & Lee L. Rev. 1127, 1146 (2009). Sexual behavior, including "[d]irty talk over the phone or sending photos of one's genitals to a child virtually from a distance, exposes children to sexual content that society has chosen to shield them from." *Id*. at 1152. Thus, the legislative policy that supports protecting children from an actor's explicit sexual behaviors in their physical presence supports shielding them from such conduct in the virtual world as well. *See id*.

We note that the circumstances in this case distinguish it from those in our recent decision, *State v. Moser*, 884 N.W.2d 890 (Minn. App. 2016). In *Moser*, we concluded that, when a person who is solicited represents that he or she is 16 or older, that solicitation occurs over the Internet, and there is no in-person contact between that person and the defendant, the statutory prohibition in the child-solicitation statute against raising a mistake-of-age defense violates the defendant's due-process rights. *Id*. at 905-06. But here, in contrast to the situation in *Moser*, it is undisputed that Decker was aware of M.J.'s age based on his previous acquaintance with her and that he specifically directed his communication toward her, knowing that he was sending an explicit photo to a 14-year-

old. His reaction immediately after sending the photo also shows that he was aware of what he had done. Thus, the history of changes in the fifth-degree criminal sexual conduct statute, public policy underlying that statute, and our recent caselaw all support an interpretation that the statutory term "present" encompasses online activity with a minor.

Decker argues that had the legislature intended to prohibit online sexual behavior toward minors in the fifth-degree criminal sexual conduct statute, it would have done so expressly. He points out that the child-solicitation statute prohibits a person from electronically communicating information describing or showing sexual conduct to a child, when the person sent the communication with a specific intent to arouse sexual desire. *See* Minn. Stat. § 609.352, subd. 2a(2), (3) (2014); *see State v. Muccio*, 890 N.W.2d 914, 918 (Minn. 2017) (upholding the constitutionality of subdivision 2a(2)). We reject Decker's argument that merely because the legislature did not specifically designate that fifth-degree criminal sexual conduct may be committed by means of electronic communication, it intended to foreclose that possibility. "[A]bsent legislative intent to the contrary, and absent discrimination against a particular class of defendants, a prosecutor may charge under any statute which is violated." *State v. Walker*, 319 N.W.2d 414, 416 (Minn. 1982). As discussed above, the evolution of the statute prohibiting fifth-degree criminal sexual conduct supports a conclusion that presence is defined for that purpose more broadly than physical presence.

Decker also argues that, even if online communication might otherwise satisfy the statutory requirement of being "present," there is no evidence that he and M.J. were simultaneously online when she received it. He maintains that the evidence does not show

that they were on a live video chat, but only that they sent text messages back and forth. He also argues that he took the photo and, at a later time, sent it to M.J., so that he was not in her presence when the photo was sent.

We disagree. Facebook Messenger has two ways to send photos: a person may either send the photo online immediately or download it to a device and send it later.[2] The record does not clearly indicate which process Decker engaged in. But it establishes that the photo was sent in the context of a continuing conversation when Decker and M.J. were both viewing their phones. And only one minute elapsed between when Decker took the photo and when it reached M.J.'s phone. Therefore, we conclude that M.J.'s online presence is sufficient to satisfy the statutory requirement that the offense of fifth-degree criminal sexual conduct must be committed in the presence of the victim. And the evidence is sufficient to support Decker's conviction of that offense based on his act committed when M.J. was "present."

II. The evidence is sufficient to sustain Decker's conviction of indecent exposure.

Decker was also convicted of gross misdemeanor indecent exposure based on his conduct of sending the photo to M.J. This offense required the state to prove that he "willfully . . . expose[d his] body, or the private parts thereof" and performed that act "in the presence of a minor under the age of 16." Minn. Stat. § 617.23, subds. 1(1), 2 (2014).[3]

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[2] The Facebook Messenger application allows users to send photos directly to their contacts either by selecting existing photos that have been downloaded or by taking new photos directly from the Messenger chat window. Http://ccm.net/faq/43880-save-photos-taken-with-facebook-messenger (last visited 3/17/2017).

[3] We note that, although the jury found Decker guilty of indecent exposure, the district court sentenced him only on the fifth-degree criminal sexual conduct offense. *See* Minn.

Decker argues that since he sent only a photo of his penis rather than a live image, the statute prohibiting lewd conduct in the presence of a minor does not apply to his behavior.[4] He maintains that because the child-solicitation statute differentiates between communicating with a child about sexual conduct and distributing material to a child that relates to or describes sexual conduct, the legislature understood the difference between the live exhibition of private parts and sharing digital images of genitals. *See* Minn. Stat. § 609.352, subd. 2a(2), (3). And he argues that the legislature's failure to similarly specify that sending digital images can amount to indecent exposure means that the legislature did not intend to penalize his conduct under section 617.23. But the legislature's listing of separate categories of acts that will sustain a conviction for electronic solicitation of children does not determine whether Decker's conduct of sending digital images of genitalia constitutes indecent exposure.

Stat. § 609.035 (2014) (stating that if a person's conduct constitutes more than one offense, the person may be punished for only one of the offenses); *see also State v. Jones*, 848 N.W.2d 528, 534 (Minn. 2014) (stating that section 609.035 prohibits the imposition of two separate sentences for convictions that involved a single course of conduct unless an exception applies).

[4] Different jurisdictions have addressed this issue differently. *See United States v. Williams*, 75 M.J. 663, 666 (Army Crim. 2016) (concluding that prohibition against indecent exposure in court-martial manual did not include sending digital image of genitals to victim, and that a "temporal and physical presence" of the victim was required); *see also Brooker v. Commonwealth of Virginia*, 587 S.E.2d 732, 735-36 (Va. Ct. App. 2003) (holding that defendant's conduct of transmitting live images of his erect penis constituted "exposure" within the meaning of an indecent-exposure statute); *cf. State v. Bouse*, 150 S.W.3d 326, 331-32 (Mo. Ct. App. 2004) (holding that defendant "exposed" his genitals to a child by sending photos of his penis online). We note that authority from other jurisdictions is merely persuasive and not binding on this court. *State v. Lindquist*, 869 N.W.2d 863, 876 (Minn. 2015).

Decker also contends that, because he did not contemporaneously take the photo and send it to M.J., he did not engage in indecent exposure. But as discussed above, the photo was transferred to M.J.'s phone within one minute of its being taken, when both parties were viewing their phones. Under the facts of this case, the jury could reasonably have determined that Decker sent the photo "in the presence of" M.J. *See* Minn. Stat. § 617.23 subds. 1, 2(1). The evidence is sufficient to sustain Decker's conviction of indecent exposure.

Affirmed.