STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0959

In the Matter of the Welfare of: S. A., Child

Filed February 20, 2018
Affirmed
Ross, Judge

Blue Earth County District Court
File No. 07-JV-16-3513

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

ROSS, Judge

The state alleged that 14-year-old S.A. lay partially naked to expose himself on the "family" locker-room floor of the Mankato YMCA, partly under the partition of a closed shower stall that a 14-year-old girl was using to change into her swimsuit. The district court adjudicated S.A. delinquent on charges of interference with privacy, indecent exposure, and fifth-degree criminal sexual conduct. S.A. appeals the adjudication, arguing that the

state did not meet its burden of proof beyond a reasonable doubt. Because the trial evidence supports the challenged elements of each charge, we affirm.

FACTS

Fourteen-year-old V.M. and her ten-year-old brother A.C. went to the Mankato YMCA in July 2016 to swim. They entered separate stalls of the "family" locker room, which is open to both genders, to change into their swimsuits. A.C. saw a boy, later identified as 14-year-old S.A., acting inappropriately in the locker room. He saw S.A. both looking under his sister's shower stall and taking pictures of her with his cellular telephone. A.C. saw the phone's flash go off while S.A. positioned the phone under the stall toward V.M. V.M. also saw S.A. when she bent over. She saw him lying on his side and partially in her stall.[1] He was directing the back of his cellphone toward V.M., as if he was photographing her, and his penis was "out over his shorts" while he touched it, wiggling it "side to side."

V.M. immediately left the stall and took A.C. to the swimming pool. After they left the pool and returned to the locker room, they saw S.A. again. V.M. went into one of the stalls pretending to be changing to see if S.A. would repeat his behavior. Within ten seconds, she heard someone enter the stall that was immediately attached to hers, and so she gathered her things and promptly left the locker room for the women's locker room. A.C. also left the family locker room, and he dressed in the men's locker room. Before they left the family locker room, V.M. and A.C. saw S.A. standing on his tiptoes in the stall

[1] V.M. described him as being "kind of half way" in her stall and his own stall.

beside V.M.'s. A.C. reported the incident to a YMCA employee, who confronted S.A. and called the police.

The state charged S.A. with interference with privacy, indecent exposure, and fifth-degree criminal sexual conduct. V.M. and A.C. testified at S.A.'s bench trial to the facts just described. S.A. gave a different story. He said that he had defeated A.C. at basketball and that A.C. was angry. S.A. said he went into the family locker room because the men's locker room was full. He testified that he changed into his swimsuit and, at one point, bent down to pick up his phone that he said he dropped into his backpack. Then he went swimming and returned to the family locker room and showered. He claimed that he laid his towel on the floor inside his shower stall, sat on it, and applied lotion to his body. Then he left the locker room and was confronted by a YMCA employee. S.A. denied looking under V.M.'s stall, using a cellphone to view or photograph anyone, or touching his genitals.

The district court did not believe S.A.'s sitting-on-the-shower-floor-to-lotion-himself story, and it adjudicated S.A. delinquent as charged. S.A. appeals.

D E C I S I O N

S.A. argues on appeal that the state failed to prove that he committed any of the three offenses. We review claims of insufficient evidence to determine whether a factfinder could reasonably conclude that the defendant is guilty, giving due regard for the presumption of innocence and the requirement that the state prove the offense charged beyond a reasonable doubt. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). This standard applies to each element. *Id*. We review challenged factual findings for clear error.

State v. Bakken, 883 N.W.2d 264, 270 (Minn. 2016). Applying our review standard, we have no difficulty in affirming S.A.'s delinquency adjudication on each of the three counts.

I

We first address S.A.'s challenge to the district court's conclusion that he committed interference with privacy. One engages in gross-misdemeanor interference with privacy if he "surreptitiously gazes, stares, or peeps in the window or other aperture of a . . . place where a reasonable person would have an expectation of privacy and . . . is likely to expose their intimate parts" when the accused has the "intent to intrude upon or interfere with the privacy of the occupant." Minn. Stat. § 609.746, subd. 1(c) (2016). We reject S.A.'s contention that, by looking at V.M. through his phone rather than looking at her directly, he did not violate the statute. He theorizes that peering through a phone is covered only by a different subdivision, which criminalizes surreptitiously using a device for observing, photographing, recording, amplifying, or broadcasting sounds or events through a window or aperture. *See id.*, subd. 1(d) (2016). We need not consider whether S.A.'s theory is correct as a matter of law, because it fails as a matter of fact. A.C. testified not only that he saw S.A. taking photographs of his sister using a phone, but that he also saw S.A. watching her directly from his position on the floor. The district court, as factfinder, weighs the evidence and assesses credibility, *In re A.A.M.*, 684 N.W.2d 925, 927 (Minn. App. 2004), and the district court expressly found S.A. less credible than V.M. and A.C. The district court's finding that S.A. peered at V.M. under the stall partition is not clearly erroneous, and the finding supports the conclusion that S.A. is guilty of interfering with V.M.'s privacy.

II

We next address S.A.'s contention that the district court erroneously concluded that he engaged in indecent exposure. A person engages in gross-misdemeanor indecent exposure by, among other methods, "willfully and lewdly" exposing his private parts in a public place to a child under 16 years old. Minn. Stat. § 617.23, subd. 2 (2016). S.A. challenges the "willfully and lewdly" element. The challenge fails.

To prove that S.A.'s exposure was willful and lewd, the state had to prove that S.A. acted "with the deliberate intent of being indecent or lewd." *State v. Stevenson*, 656 N.W.2d 235, 240 (Minn. 2003) (quoting *State v. Peery*, 224 Minn. 346, 351, 28 N.W.2d 851, 854 (1947)). This deliberate intent can be proved in two different ways. It can be proved "by evidence of motions, signals, sounds, or other actions by the accused designed to attract attention to his exposed condition." *Peery*, 224 Minn. at 352, 28 N.W.2d at 854. Or it can be proved "by his display in a place so public and open that it must be reasonably presumed that it was intended to be witnessed." *Id.* The district court found deliberate intent by applying the first option. It found particularly that S.A.'s penis wiggling "could only be intended to attract attention to his exposed condition." We cannot fault that reasoning.

We are not moved to a different conclusion by S.A.'s contention that V.M. observed his genitals "merely by chance" when V.A. bent down. V.M. testified that S.A. had positioned himself partway under the partition that separated her stall from his. So although V.M. might not have noticed S.A. until she bent over, S.A.'s body positioning and genital manipulations demonstrated that his motive was lewd—to be noticed—and this sufficiently and reasonably supports the indecent-exposure conclusion.

III

We address finally S.A.'s contention that the evidence does not support the district court's conclusion that he engaged in fifth-degree criminal sexual conduct. A person engages in fifth-degree criminal sexual conduct if he "engages 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) (2016). S.A. argues first that his conduct did not amount to a "lewd exhibition" because of the setting in a shower stall, which, he explains, naturally involves nudity and touching one's genitals. He adds that he routinely sits on the floor after showering to dry off and apply lotion. S.A. argues second that the presence-of-a-minor element was not met because nudity inside his stall was not reasonably viewable by a minor.

Both arguments fail under the same evidence we have already discussed. The district court reasonably believed V.M.'s and A.C.'s accounts. These accounts have S.A. lying on the floor somewhat under the partition of V.M.'s stall and gawking at V.M. while S.A. engaged in a method of self-handling that is uncommon to both showering and lotioning. S.A. has given us no reason to upset the adjudication of delinquency for fifth-degree criminal sexual conduct.

Affirmed.