STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0891

State of Minnesota,
Appellant,

vs.

Sahra Abdilahi Ahmed,
Respondent.

Filed December 17, 2018
Reversed and remanded
Rodenberg, Judge

Kandiyohi County District Court
File No. 34-CR-17-954

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

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for appellant)

Mark D. Nyvold, Fridley, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Klaphake, 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

RODENBERG, Judge

The state appeals from the district court's order dismissing three counts of felony nonconsensual dissemination of private sexual images against respondent Sahra Abdilahi Ahmed for want of probable cause. We reverse and remand.

FACTS

On September 12, 2017, Willmar Police Department Officer Zach Herzog responded to a call from a young woman who reported that an individual was posting inappropriate pictures of her on social media. The caller, S.C, reported that an acquaintance, C.J., had been posting an image of S.C. on various social-media accounts, including Snapchat. The image showed S.C. fellating a man.[1]

Officer Herzog tried to contact C.J. by phone. After attempts failed, Officer Herzog decided to go to C.J.'s home. Almost immediately after Officer Herzog arrived at C.J.'s home, C.J. told Officer Herzog that she "already took the post down." Officer Herzog warned C.J. that she could be charged with a crime for posting the picture online and warned her that if she posted the image again, she would be charged. He also advised her that "if she knew of anybody else with the photograph to advise them of the same."

[1] The various incarnations of the image discussed in this case all appear to use the same original picture. How and by whom the picture was originally made remains uncertain. S.C.'s face is clearly visible and identifiable in the image. The image clearly depicts a sex act. S.C. appears not to be looking at the camera, and nothing in the image evidences that S.C. is aware of the image being created.

Between the time that C.J. posted the image and police began investigating the matter, respondent took a screen shot of the image that C.J. had shared and then posted it to her own Facebook and Twitter accounts. Respondent set the image as her Facebook profile picture. This version of the image included rows of pink flowers at the top and bottom, and the message, "More savage than me" was written over the flowers, with a smiley-face emoji behind it.

S.C. became aware of the additional postings of the picture after a friend informed her that respondent had set the image as her Facebook profile picture. Respondent began posting the photo shortly after it appeared on C.J.'s Snapchat. C.J. is a friend of respondent.

S.C. contacted Officer Herzog to report respondent's postings of the image, and sent him screen shots of respondent's Facebook page. The following morning, S.C. messaged Officer Herzog and told him that respondent had also posted the image on Snapchat and Twitter. S.C. sent Officer Herzog a screen shot of the Twitter post containing the picture of S.C.

S.C. thrice messaged respondent and asked her to remove the photos. In the third message, S.C. said, "it's sad how your miserable—delete from everything." Respondent told S.C. to stop messaging her and to "get off my DM before I really post the video." Despite S.C.'s repeated requests for respondent to remove the image from social media and delete it, respondent continued to display the picture on her social-media accounts.

S.C. sent Officer Herzog a copy of messages exchanged via Twitter between S.C. and respondent and told Officer Herzog that she was "100% certain" that the account belonged to respondent. Officer Herzog tried to reach respondent by phone and tried to

locate respondent at two of her recent addresses, but he was unable to make contact with her.

Several days later, S.C. spoke with Willmar Police Department Officer Benjamin Hanneman. S.C. told Officer Hanneman that many people in the community had seen the image of her. S.C. thought that the image was taken during the 2016-17 school year when she had attended a party, but she could not recall any specific date. In another conversation with Officer Herzog, S.C. stated that the penis in the picture is that of R.B., also a student at the community college. S.C. did not know who took the picture, but she said that whoever took it did so without her consent. She did not know how C.J. or respondent obtained the image and did not know that the image had been taken. Officer Herzog attempted to contact R.B., but he was no longer a student at the community college and did not return phone calls.

The state charged respondent with three counts of nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261 (2016). Respondent moved to dismiss the charges as being unsupported by probable cause. After an omnibus hearing, the district court dismissed the charges, finding that the state failed to establish probable cause. The state appealed. In a special term order, we questioned jurisdiction. *See* Minn. R. Crim. P. 28.04, subd. 1(1) (providing that a pretrial order dismissing a case for lack of probable cause cannot be appealed if the dismissal is premised solely on a factual determination). After briefing, we accepted jurisdiction because the appeal presented a legal question.

This appeal followed.

D E C I S I O N

I. We have jurisdiction over this appeal, because the state's appeal presents a legal question and requires consideration of what conduct Minn. Stat. § 617.261 prohibits.

The parties disagree about whether the district court's probable-cause dismissal is appealable. Respondent continues to argue that, despite our previous special-term order accepting jurisdiction, we should conclude that the state's appeal should be dismissed because the issue is fact-based.

"When the state appeals a pre-trial order, we will only reverse if the state clearly and unequivocally shows (1) that the ruling was erroneous and (2) that the order will have a critical impact on its ability to prosecute the case." *State v. Barker*, 888 N.W.2d 348, 352 (Minn. App. 2016) (quotation omitted). "Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) (citing *State v. Kim*, 398 N.W.2d 544, 550 (Minn. 1987)).

In our special-term order, we determined that the district court appears to have considered only the direct evidence of what respondent knew concerning the image. The plain language of the statute requires consideration of both what respondent knew and what respondent reasonably should have known. *Id.* In our special-term order, we determined that "the probable-cause dismissal presents a legal question because it requires consideration of what conduct the statute prohibits. Accordingly, this court has jurisdiction to consider the merits of the appeal." That holding is now the law of the case. *See Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997) ("[A]s a general rule, an appellate court

decision on a particular issue establishes the law of the case, not subject to reexamination on a second appeal of the same case." (quotation omitted)); *see also State ex rel. Leino v. Roy*, 910 N.W.2d 477, 481 (Minn. App. 2018) ("We have applied [Minn. R. Civ. App. P. 140.01] to foreclose reconsideration of an issue that a special term panel of this court decided prior to considering the merits of an appeal.").[2]

We turn to the merits of the state's appeal.

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[2] Moreover, and even if our special-term order were not regarded as the law of the case, we independently consider the issue raised by the state's argument concerning the construction of section 617.261 to be a question of law. In dismissing the complaint, the district court found that there was insufficient evidence to support probable cause under parts (2) and (3) of Minn. Stat. § 617.261, subd. 1. The district court found that there was insufficient evidence to support that respondent should have known that S.C. did not consent to the images being put onto social media, because "[t]he origins of the image are even unknown by [S.C.] herself, let alone as to where [C.J.] got the image, which led to [respondent's] use of the image."

The state's right to appeal in criminal cases includes "probable cause dismissal orders based on questions of law." Minn. R. Crim. P. 28.04, subd. 1(1); *see also State v. Dunson*, 770 N.W.2d 546, 549 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). Conversely, "a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable cause premised solely on a factual determination." Minn. R. Crim. P. 28.04, subd. 1(1). Whether the dismissal is based on a legal or factual determination is a threshold jurisdictional question. *Dunson*, 770 N.W.2d at 549.

The statute prohibiting dissemination of private sexual images requires the state to prove that the actor "knows or reasonably should know that the person depicted in the image does not consent to the dissemination" and that the "image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." Minn. Stat. § 617.261, subd. 1(2), (3). To determine what conduct is prohibited under the statute, we must determine the significance of the reasonably-should-have-known language in parts (2) and (3) of subdivision 1. While probable-cause determinations are mixed questions of law and fact, "once the facts have been found, the court must apply the law to determine whether probable cause exists." *State v. Moe*, 498 N.W.2d 755, 758 (Minn. App. 1993).

II. The district court erroneously dismissed the charges against respondent under Minn. Stat. § 617.261 for lack of probable cause by failing to consider the circumstantial evidence of what respondent reasonably should have known.

To determine whether the district court properly dismissed the complaint for want of probable cause, we must first determine what conduct is prohibited under Minn. Stat. § 617.261. We review de novo a district court's dismissal of a complaint based on the construction of a statute. *State v. Hanson*, 583 N.W.2d 4, 6 (Minn. App. 1998) (citation omitted), *review denied* (Minn. Oct. 29, 1998). "When interpreting a statute, we must first determine whether the statute's language, on its face, is clear or ambiguous." *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012) (quotation omitted). "We construe words and phrases according to their plain and ordinary meaning." *State v. Randolph*, 800 N.W.2d 150, 154 (Minn. 2011) (quotation omitted). A statute is ambiguous only when the statutory language is subject to more than one reasonable interpretation, and if the statute is unambiguous, we apply the statute's plain meaning. *Fleck*, 810 N.W.2d at 307. We give a "reasonable and sensible construction to criminal statutes." *State v. Greenman*, 825 N.W.2d 387, 390 (Minn. App. 2013) (quotation omitted).

Minn. Stat. § 617.261 provides that it is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when (1) the person is identifiable, (2) "the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination," and (3) "the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." Minn. Stat. § 617.261, subd. 1. The statute does not further define

the words "reasonably should know." The offense is a felony if "the actor posts the image on a Web site" or if "the actor disseminates the image with intent to harass the person depicted." *Id.*, subd. 2(b)(4), (5).

"While statutory construction focuses on the language of the provision at issue, it is sometimes necessary to analyze that provision in the context of surrounding sections." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). "Know" is defined in chapter 609 as requiring "only that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2016). The supreme court has defined "reason to know," in the context of possession of child pornography under chapter 617, as a recklessness standard—that the possessor is subjectively aware of a substantial and unjustifiable risk that the work involves a minor. *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007) (interpreting Minn. Stat. § 617.247, subd. 4(a)). In *Mauer*, the supreme court stated that "reason to know" may be proved by circumstantial evidence. *Id.*

The state argues that, while the district court seems to have considered the available circumstantial evidence, it appears to have considered that evidence only as it might have indicated respondent's actual knowledge of S.C.'s nonconsent to dissemination and her reasonable expectation of privacy. But the statute prohibits dissemination not only when the actor actually knew of the depicted person's nonconsent and her privacy expectations; it also prohibits dissemination based on what the actor *reasonably should know*.

To be sure, the record here includes no direct evidence that, at the time respondent initially posted the image in question, she actually knew that S.C. did not consent to dissemination or that respondent had actual knowledge of S.C. having asserted an

expectation of privacy. But on this record, there is evidence sufficient to establish probable cause that respondent should have known of S.C.'s nonconsent and her expectation of privacy during the time period over which respondent disseminated the image using several social-media accounts.

In finding that there was insufficient probable cause to support the charges, the district court focused on the fact that "[t]he origins of the image are even unknown by the victim herself, let alone as to where [C.J.] got the image, which led to [respondent's] use of the image." But the state need not prove precisely how the image was created. The statute prohibiting dissemination of sexual images does not require proof of how the image was created or that the actor is subjectively aware of precisely how and when it was created. Rather, the statute prohibits dissemination in circumstances where the actor "reasonably should know" that the depicted individual did not consent to the dissemination of the images and had a reasonable expectation of privacy. On this record, there is circumstantial evidence to indicate that respondent reasonably should have known that S.C. did not consent to the dissemination of the images.

S.C. contacted police after the image was posted and S.C. told respondent multiple times to remove the image from social media. The circumstantial evidence is sufficient to support a conclusion that respondent knew that the image was not posted by the woman depicted in the image. Police also told C.J., respondent's friend, to stop posting the picture and told her to tell her friends as well. Police warned C.J. that she and her friends could be charged with a crime for posting the image online. After this conversation between C.J. and police, respondent messaged S.C. stating that, "Calling the cops on [C.J.] won't change

anything." A fact finder might infer from the language accompanying the image—"more savage than me"—that respondent knew or should reasonably have known that S.C. did not consent to the image's posting. Accordingly, the evidence of record is sufficient for probable-cause purposes to satisfy the reasonably-should-know language in the statute, concerning the issue of S.C.'s nonconsent to dissemination.

Similarly, the record evidence is sufficient to establish probable cause that respondent reasonably should have known that S.C. had a reasonable expectation of privacy when the image was obtained or created. S.C. stated that she and the male in the photo went into a bedroom before she fellated him, but that she was unaware of anyone else having been present in the room with them. S.C. said that R.B. probably captured the image. And the image itself depicts nothing negating the ordinary expectation of privacy that attends sexual activity.[3] S.C. immediately contacted the police when she was aware that the photo had been posted onto both C.J.'s and respondent's social-media accounts.

We also conclude that respondent's conduct of allowing the already-posted image to remain on social media constitutes continuing "dissemination" under the statute from the time of the original posting until the image was removed. "Dissemination" is defined as "distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium." Minn. Stat. § 617.261, subd. 7(b) (2016).

[3] Respondent's counsel seemed to argue at oral argument that the image itself suggests that S.C. had no reasonable expectation of privacy. There are some images from which it is evident either that the subject made the image herself—a "selfie"—or is clearly aware of the image being created. But in this image, S.C. is not looking at the camera and nothing about the image suggests that she was aware of the image being created or that she was not expecting privacy.

In the context of social-media postings, dissemination continues for the period of time that the posting remains available on social media. In other words, using social media to distribute a picture is fundamentally different than handing a piece of paper to one person. *Cf. State v. Johnson*, No. A18-0112, 2018 WL 2770368, at *4 (Minn. App. June 11, 2018) (concluding that appellant's conduct of delivering the images in a closed envelope to one person, the victim's significant other, "seems to have met the minimum conduct necessary to be dissemination"). Social-media posts, an "image on a web page," remain available. *See* Minn. Stat. § 617.261, subd. 2(b)(3). The dissemination of an image by social media continues while the image remains available on social media and ends when the person takes down the posting or image.

Importantly, the record here supports the inference that respondent knew or should have known after posting and before she deleted the posts that S.C. did not consent to the dissemination and was affirmatively asserting a reasonable expectation of privacy. In a later message while the image remained available for viewing, respondent expressed that getting the "cops" involved was not going to change anything. This comment evidences actual awareness by respondent that S.C. was objecting to the continued dissemination of the picture.

Respondent also argues that our decisions in *State v. Duffy*, 559 N.W.2d 109 (Minn. App. 1997), and *State v. Estrella*, 700 N.W.2d 496 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005), support dismissal here. But in those cases, there was *no* evidence to support a finding of probable cause. In *Duffy*, we dismissed the state's pretrial appeal because there was no evidence, direct or circumstantial, of an overt act in actual furtherance

of a drug sale or conspiracy to sell drugs. 559 N.W.2d at 111. Similarly, in *Estrella*, the district court dismissed the charges against the defendant after finding that "there is no evidence of a criminal enterprise between [respondent] and his parents." 700 N.W.2d at 499. In *Estrella*, we dismissed the state's pretrial appeal because the issue was fact-based, and we noted that the state could "gather more evidence against respondent and re-file if it so choses." *Id.* at 499-500.

This case is unlike *Duffy* and *Estrella*. Here, the evidence is what it is—circumstantial evidence of what respondent knew or reasonably should have known about S.C.'s consent and her expectation of privacy—both at the time of the initial posting, and during the time that the posting remained available on social media. Respondent's inflammatory comments that attended the posts are evidence that she knew or should have known that S.C. was not consenting to the continuing dissemination of the image and was asserting a reasonable expectation of privacy.

Our analysis here is, of course, limited to the question of probable cause. It remains to be seen whether the state can prove the elements of the charged offenses beyond reasonable doubt. The question before us is limited to whether, properly construing the statute, there is probable cause to believe that respondent committed the charged offenses. We conclude that the record evidence is sufficient to establish probable cause, and we therefore reverse and remand for further proceedings.

Reversed and remanded.