

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1352**

In the Matter of the Welfare of: N. R. C.-A., Child.

Filed December 6, 2021

Affirmed

Smith, Tracy M., Judge

Itasca County District Court
File No. 31-JV-17-721

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant N.R.C.-A.)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

After juvenile appellant N.R.C.-A. was charged with possession of child pornography for engaging in voluntary “sexting” with a teen two years his junior, he agreed to a continuance for dismissal, which was eventually terminated, and he was adjudicated delinquent. In this appeal, N.R.C.-A. argues that his adjudication should be reversed

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

because (1) the district court erred when it concluded that N.R.C.-A. materially violated the continuance-for-dismissal agreement; (2) the district court erred when it denied his motion to dismiss based on selective prosecution; (3) the child-pornography statute, as applied to teenage couples engaging in voluntary sexting, violates fundamental due-process rights; and (4) the evidence is insufficient to adjudicate him delinquent because the child-pornography statute does not criminalize voluntary teen sexting.

We conclude that the district court did not err in its ruling that N.R.C.-A. materially violated the continuance-for-dismissal agreement or its ruling that N.R.C.-A. was selectively prosecuted based on his gender. We decline to address N.R.C.-A.'s as-applied due-process challenge because N.R.C.-A. did not raise the issue in the district court. Finally, we conclude that the evidence is sufficient to support N.R.C.-A.'s delinquency adjudication under the plain language of the child-pornography statute. We therefore affirm.

FACTS

In March 2017, respondent State of Minnesota filed a juvenile-delinquency petition charging then 16-year-old N.R.C.-A. with possession of child pornography based on sexually explicit images of then 14-year-old D.B. found on N.R.C.-A.'s phone and tablet computer. The images were from spring 2016, when the two teens had engaged in sexting with each other, sending each other nude and sexually explicit images. D.B. was not charged.

In April 2017, N.R.C.-A. entered into a continuance-for-dismissal agreement with the state under Minn. R. Juv. Delinq. P. 14. That agreement was conditioned on N.R.C.-

A.'s compliance with the general terms of probation and the completion of a psychosexual evaluation, including following all recommendations of that evaluation. The district court's jurisdiction continued until N.R.C.-A.'s 19th birthday.

Starting immediately after his entry into the continuance-for-dismissal agreement, N.R.C.-A. committed probation violations. In May and July, 2017, he admitted violations involving marijuana and alcohol.

A psychosexual evaluation performed in June 2017 recommended that N.R.C.-A. be required to complete a residential sex-offender treatment program. The district court then incorporated this recommendation into an order, and N.R.C.-A. began residential treatment in August 2017. While in the residential treatment program, N.R.C.-A. engaged in further probation violations, including, when he was 18, engaging in sexual conduct with a minor.

As his 19th birthday approached in September 2018, N.R.C.-A. was still in the residential treatment program. The program reported that his lack of progress was concerning. N.R.C.-A. was offered the opportunity to continue in the residential treatment program after his 19th birthday, but he declined. N.R.C.-A. was unsuccessfully discharged from the program. Twelve days before N.R.C.-A.'s birthday, the state moved to terminate the continuance for dismissal, alleging that N.R.C.-A. materially violated the conditions of the agreement by failing to complete sex-offender treatment. The district court granted this motion, and the state resumed prosecution.

Prior to trial, N.R.C.-A. moved for dismissal of the charge based on selective prosecution, alleging that the state violated his equal-protection rights by prosecuting him

and not D.B. based on gender. The district court denied that motion. The court determined that the state’s gender-neutral reason for its prosecution decision—the age difference between N.R.C.-A. and D.B.—was rational, and that N.R.C.-A. had not proven intentional discrimination. After a bench trial, the district court adjudicated N.R.C.-A. delinquent for possession of child pornography.

N.R.C.-A. appeals.

DECISION

I. The district court did not err when it concluded that N.R.C.-A. materially violated the continuance-for-dismissal agreement.

N.R.C.-A. argues that the district court erred when it terminated the continuance-for-dismissal agreement because (1) the prosecution did not adequately state the facts supporting its motion to terminate as required under Minn. R. Juv. Delinq. 14 and (2) there was not a material violation because the agreement did not require N.R.C.-A. to complete treatment before his 19th birthday.

A. The Prosecution’s Statement of Facts

We begin with N.R.C.-A.’s argument regarding the adequacy of the statement of facts in the state’s motion to terminate under rule 14. Because N.R.C.-A. did not challenge the adequacy of the state’s motion at the district court, we apply the plain-error standard of review. *See State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). Under this test, N.R.C.-A. must show (1) that there was an error, (2) that this error was plain, and (3) that the error affected his “substantial rights.” *Id.* “An error is plain if it is clear or obvious, which is

typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted).

Under rule 14, a child and the state can agree to a continuance for dismissal. Under this agreement, the state agrees to suspend prosecution for a period of time “without a finding that the allegations of the charging document have been proved” and will eventually dismiss the offense if the child complies with certain conditions. Minn. R. Juv. Delinq. P. 14.01. The court can terminate this agreement if, “upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing,” the court finds that the child or their counsel misrepresented material facts or the child materially violated the agreement. Minn. R. Juv. Delinq. P. 14.04, subd. 2.

Here, the state’s motion to terminate the continuance-for-dismissal agreement alleged that N.R.C.-A. violated it “by failing to complete sex offender treatment as required.” At the motion hearing, the state again reiterated that N.R.C.-A. “was not able to complete his treatment obligations.”

The state adequately stated the factual basis for its motion under rule 14. N.R.C.-A.’s agreement explicitly required him to complete a psychosexual evaluation and follow all recommendations. That evaluation recommended that he successfully complete residential sex-offender treatment. N.R.C.-A. did not successfully complete the program. All this information was known to N.R.C.-A. The state’s motion sufficiently informed him that that was the reason for its motion to terminate. The district court did not err—much less plainly err—by proceeding to resolution of the motion to terminate.

B. The Material Violation

N.R.C.-A. next asserts that he did not materially violate the agreement because he was not required to complete treatment before his 19th birthday. Therefore, he argues, because he remained in treatment until his 19th birthday—when the district court’s jurisdiction over his case expired—he did not materially violate the continuance-for-dismissal agreement.

N.R.C.-A. briefed this issue under the plain-error standard of review because he did not challenge the state’s motion to terminate the agreement on substantive grounds. The district court observed that N.R.C.-A. did not present evidence or argument refuting the state’s claim that he materially violated the terms of the agreement, but the district court made its finding of material violation based on the facts in the record. In these circumstances, we decide to apply the clear-error standard of review, which is less onerous to N.R.C.-A. *See State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010) (observing that factual findings will not be set aside “unless clearly erroneous”). Findings of fact are clearly erroneous when we “are left with the definite and firm conviction that a mistake occurred.” *Id.*

The district court did not clearly err when it determined that N.R.C.-A. materially violated his agreement. The agreement stated that the district court’s jurisdiction continued until N.R.C.-A.’s 19th birthday. The agreement required completion of the conditions of the agreement by that date. One of the conditions was compliance with the recommendations of a psychosexual evaluation. N.R.C.-A.’s psychosexual evaluation recommended completion of a residential sex-offender treatment program. N.R.C.-A.

entered residential treatment in August 2017. During his time there, he reoffended with a minor and, according to the program's discharge summary, had not actively participated in treatment, resulting in "a limited demonstration of an understanding of his offending patterns." N.R.C.-A. was unsuccessfully discharged from the program. The district court observed that N.R.C.-A. had begun to show genuine progress in the latter months of the program and was offered the opportunity to remain in it to attempt successful completion but had declined that opportunity. The record supports the finding that N.R.C.-A. failed to complete treatment as required by the agreement. The district court did not clearly err by finding a material violation and terminating the continuance-for-dismissal agreement.

II. The district court did not clearly err by denying N.R.C.-A.'s motion to dismiss based on selective prosecution.

N.R.C.-A. contends that the district court erred when it denied his motion to dismiss based on selective prosecution because the state prosecuted him, a male, and not D.B., a female, even though they engaged in the same behavior.

The Fourteenth Amendment "forbids the discriminatory enforcement of nondiscriminatory laws." *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 502 (Minn. 1976). Both the United States Constitution and the Minnesota Constitution require equal treatment of "all similarly situated individuals," but only "invidious discrimination" is considered "constitutionally offensive." *In re Welfare of B.A.H.*, 845 N.W.2d 158, 165 (Minn. 2014) (quotations and citations omitted). An invidiously discriminatory decision is based on an impermissible consideration, like race, religion, or sex. *Id.* at 165 (citation omitted); *State v. L'Italien*, 363 N.W.2d 490, 492 (Minn. App. 1985), *rev. denied* (Minn.

Apr. 26, 1985). To succeed on a selective-prosecution claim, the defendant has the “burden of establishing, by a preponderance of the evidence, that the decision to charge [the defendant] and not [another person] was invidious.” *B.A.H.*, 845 N.W.2d at 165 (quotations and citations omitted). In the absence of a claim of intentional discrimination based on an impermissible consideration such as sex, a charging decision need only be rational. *Id.*¹

We review the district court’s determinations of purposeful or intentional discrimination and of a rational basis for a charging decision for clear error. *See L’Italien*, 363 N.W.2d at 492.

As a threshold matter, the state conceded that N.R.C.-A. and D.B. were similarly situated, so the key question is whether the district court clearly erred when it found that N.R.C.-A. did not establish intentional discriminatory prosecution based on gender. In support of his motion, N.R.C.-A. argued that the state intentionally discriminated against him because he engaged in the same behavior as D.B., the sexting between him and D.B. was voluntary, and the state only targeted N.R.C.-A., a male, and not D.B., a female. N.R.C.-A. did not offer any evidence of affirmative discrimination and instead relied on evidence that could establish an inference of discrimination. The state responded by

¹ At oral argument, N.R.C.-A. argued that, in a selective-prosecution claim, the defendant only has the burden to make a prima facie showing of discrimination and then the state has the burden of proving nondiscrimination. But, in *B.A.H.*, the supreme court stated that the defendant bears “the burden of establishing”—in other words, proving—that the decision to charge the defendant was based on invidious discrimination. *B.A.H.*, 845 N.W.2d at 165. While earlier supreme court cases discuss the defendant having the “heavy burden of establishing, at least *prima facie*,” invidious discrimination, *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984), and the “burden of producing evidence of discrimination,” *Buschette*, 240 N.W.2d at 503, those cases do not go on to state that the ultimate burden of proof shifts to the state once a prima facie case is established.

asserting that the charging decision was rationally based on the age difference between N.R.C.-A. and D.B.

The district court did not clearly err by determining that the age difference was a rational basis and a gender-neutral reason for prosecuting only N.R.C.-A. At the time of the prosecuted conduct, D.B. was only 14 years old and was two-and-one-quarter years younger than N.R.C.-A. In his brief to this court, N.R.C.-A. cites to scientific literature on the differences in maturity levels between teen boys and teen girls, but not only was that information not presented to the district court, it is not specific to the individuals in the case at hand. On the record before it, the district did not err by deciding that N.R.C.-A. failed to meet his burden to establish discriminatory prosecution.

III. Because N.R.C.-A. did not raise his due-process claim at the district court, we decline to reach this issue.

N.R.C.-A. argues that application of the pornographic-works statute to his conduct—specifically, to “voluntary teenage sexting”—violates his fundamental due-process rights to personal and sexual autonomy. N.R.C.-A. did not raise this issue in the district court.

As a general rule, appellate courts will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Appellate courts may, in their discretion, address issues not raised at the district court “when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal.” *Id.* A key consideration in deciding whether to address an issue first raised on appeal is whether the issue involves questions of fact that

were not developed in the district court. *See State v. Johnson*, 851 N.W.2d 60, 64 (Minn. 2014).

N.R.C.-A. challenges the child-pornography statute as applied to him. This type of challenge “argues that the statute is unconstitutional as applied to the individual’s conduct.” *State v. Bussmann*, 741 N.W.2d 79, 100 (Minn. 2007). An as-applied challenge depends on the specific circumstances of the case. *See Rew v. Bergstrom*, 845 N.W.2d 764, 780-81 (Minn. 2014). We cannot conclude that, if N.R.C.-A. had raised his as-applied challenge in the district court, the factual record regarding the relevant circumstances would not have been further developed. We therefore decline to consider N.R.C.-A.’s as-applied challenge.

IV. The evidence is sufficient to prove beyond a reasonable doubt that appellant was guilty of possession of child pornography.

N.R.C.-A.’s final argument is that the state failed to prove beyond a reasonable doubt that he was guilty of possession of child pornography. His argument depends on an interpretation of Minn. Stat § 617.247 (2014), which, he asserts, does not criminalize the possession of sexually explicit images obtained in the course of voluntary sexting between teenagers.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts “carefully examine the record to determine whether the facts and legitimate inferences drawn from them” would permit a reasonable fact-finder to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). The evidence is viewed in the light most favorable to the verdict, and it is assumed that the fact-finder disbelieved any evidence that conflicted with the verdict. *Id.*

However, if we must interpret a criminal statute in order to evaluate whether the evidence is sufficient to support a conviction, we review the issue of statutory interpretation *de novo*. *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

The object of statutory interpretation is to “effectuate the intent of the legislature.” *State v. Smith*, 876 N.W.2d 310, 336 (Minn. 2016) (quotation and citation omitted). When interpreting a statute, we first ask whether the language of the statute is ambiguous. *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). If the meaning of the statute is unambiguous, then the plain language of the statute controls. *Id.* If the plain language of the statute is subject to more than one reasonable interpretation, then the statute is ambiguous. *Id.* We may then use the canons of construction to resolve ambiguity. *See id.*

N.R.C.-A. was adjudicated delinquent under Minn. Stat. § 617.247. Subdivision 4(a) of that statute provides that a person commits a felony if the person “possesses a pornographic work” or any sort of electronic or other storage system “containing a pornographic work, knowing or with reason to know its content and character.” *See* Minn. Stat. § 617.247, subd. 4(a). A “pornographic work” is statutorily defined as a work showing “sexual performance involving a minor” or a work that “uses a minor to depict actual or simulated sexual conduct.” Minn. Stat. § 617.246, subd. 1(f) (2014) (incorporated by Minn. Stat. § 617.247, subd. 2). Consent of the minor is not a defense. Minn. Stat. § 617.247, subd. 6.

N.R.C.-A. does not argue that, on their face, the elements identified by subdivision 4(a) are not satisfied by sufficient evidence. Rather, he argues that, when the

statute is read as a whole, it is plain that the legislature did not intend to criminalize consensual teenage sexting.

N.R.C.-A. hinges his argument on subdivision 1 of section 617.247. Subdivision 1 identifies the “policy of the legislature in enacting” section 617.247 as protecting minors from the “physical and psychological damage” of child pornography. It further states that it is the “intent of the legislature” to penalize the possession of child pornography in order “to protect the identity of minors who are victimized by involvement in the pornographic work” and to protect minors “from future involvement” in child pornography. Minn. Stat. § 617.247, subd. 1.

Based on this language, N.R.C.-A. argues that section 617.247 criminalizes only the possession of child pornography when the child suffered “physical and psychological damage” such that the child was “victimized,” and that “[w]hen teenagers voluntarily send . . . sexually explicit material involving themselves to other teenagers, they are not harmed or victimized.” Based on this interpretation of the statute, N.R.C.-A. argues that the evidence is insufficient to support conviction because D.B. voluntarily engaged in sexting with N.R.C.-A.

We are not persuaded by N.R.C.-A.’s argument regarding the meaning of section 617.247. The plain language of subdivision 4(a) clearly states the elements of the offense: (1) possession of child pornography and (2) knowledge of its content and character. The policy and purpose statement in subdivision 1 is broadly written to identify the motivation of the legislature in enacting all of section 617.247. We do not read that subdivision as, in essence, creating a new element of “victimization” to be proved by the state in child-

pornography possession cases involving teenage offenders. *See State v. Bakken*, 883 N.W.2d 264, 267 (Minn. 2016) (discussing provisions of subdivision 4(a) when describing conduct that is criminalized by section 617.247); *State v. Cannady*, 727 N.W.2d 403, 406 (Minn. 2007) (same). We thus conclude that the legislature has not defined the offense to exclude voluntary sexting between teenagers.

Again, N.R.C.-A. does not challenge the sufficiency of the evidence to satisfy the elements of subdivision 4(a). And our review of the record confirms that, through the testimony of N.R.C.-A. and D.B., the state proved beyond a reasonable doubt that N.R.C.-A. violated section 617.247, subdivision 4(a). N.R.C.-A.'s sufficiency-of-the-evidence argument therefore fails.

Affirmed.