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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1063**

State of Minnesota,
Respondent,

vs.

John Scott Zavoral,
Appellant.

**Filed June 18, 2012
Affirmed
Peterson, Judge**

Polk County District Court
File No. 60-CR-10-1721

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,
Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

Appellant argues that his convictions of use of a minor in a pornographic work and possession of a pornographic work involving a minor must be reversed because the photograph found on his cell phone did not constitute use of a minor to depict actual or simulated sexual conduct within the meaning of Minn. Stat. §§ 617.246-.247 (2008). We affirm.

FACTS

Appellant John Scott Zavoral used his cell phone to photograph the victim, a two-year-old girl, while alone with her in her bedroom. The photo showed the victim from the breast area to just above her knees, lying naked on her back with her legs spread apart. The victim's vagina was clearly depicted in the photo, and the photo did not show her face.

The victim's mother found appellant in the bedroom with the naked victim and reported the incident to police. A police detective went to appellant's residence, and appellant gave his cell phone to the detective. Appellant admitted that he viewed the photo once after taking it.

Appellant was charged with one count each of use of a minor in a pornographic work and possession of a pornographic work involving a minor. The case was submitted to the district court for decision on stipulated facts. The district court found appellant guilty as charged. The court explained:

The Court . . . finds that [appellant] knew or had reason to know that his conduct in taking the photograph was intended as a pornographic work inasmuch as he took the photograph of [the victim's] naked vagina, had viewed it after taking the photograph, and had it in his actual possession at the time he was confronted by law enforcement. The Court does not find credible [appellant's] apparent claims that someone else set him up, or that there exists the possibility that the [victim] took off her own diaper and posed herself for the photograph taken by [appellant] of [the victim's] naked vagina.

The district court sentenced appellant to an executed term of 72 months in prison for the conviction of use of a minor in a pornographic work. This appeal followed.

D E C I S I O N

It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance or a pornographic work.

Minn. Stat. § 617.246, subd. 2 (2008). It is also unlawful for a person to “possess a pornographic work . . . knowing or with reason to know its content and character.” Minn. Stat. § 617.247, subd. 4(a) (2008). A “pornographic work” includes a visual image that “uses a minor to depict actual or simulated sexual conduct.” Minn. Stat. § 617.246, subd. 1(f)(2)(i) (2008). The definition of “sexual conduct” includes “lewd exhibitions of the genitals.” Minn. Stat. § 617.246, subd. 1(e)(4).

Appellant challenges the legal standard that the district court applied to the facts of this case in determining that the photograph was a lewd exhibition of the victim's genitals. We review this issue as a mixed question of law and fact, which requires that

we apply the controlling legal standard as set by the governing statutes to the historical facts as determined by the district court. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998) (applying standard in determining whether interrogation was custodial); *see also State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010) (applying de novo standard of review to determine whether undisputed facts supported conviction of aiding and abetting kidnapping).

Lewd is synonymous with “obscene” or “openly lustful or indecent.” *State v. Botsford*, 630 N.W.2d 11, 17 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001) (obscene); *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 79 (Minn. App. 1985) (openly lustful or indecent). An obscene work is one ““which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.”” *Botsford*, 630 N.W.2d at 17 (quoting *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973)); *see also The American Heritage Dictionary of the English Language* 1460 (3d ed. 1992) (defining “prurient” as “[i]nordinately interested in matters of sex”). “Lustful” means “excited or driven by lust,” and “lust” means “intense or unrestrained sexual craving.” *The American Heritage Dictionary of the English Language* at 1071.

The victim was naked in the photo, and the photo showed her from the breast area to just above her knees. She was lying on her back on a bed with her legs spread apart. Appellant argues: “While the image clearly shows the [victim’s] genitals it is unclear whether the focus of the image is the genitals, abdomen, or marks on the [victim’s]

thighs. . . . [N]othing about the visual image would lead an objective viewer to conclude that it was anything but a clinical pictorial of a child's midsection." But the district court made detailed findings on the nature of the photograph and the circumstances under which it was taken, including that "[t]he photograph clearly depicted [the victim's] naked vagina, and this appears to be the central focus of the photograph." The district court found that appellant's claims that he had been set up or that the child had removed her diaper and posed herself for the photograph were not credible, and no evidence in the record indicates that the purpose of the picture was clinical. We defer to the district court's credibility determinations. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003).

Appellant's argument about the purpose of the photo is refuted by the district court's findings, particularly the finding that the victim's naked vagina "appears to be the central focus of the photograph." Absent a credible, contrary explanation, the photo, which shows the victim's naked torso and the central focus of which is the victim's genitals, is a lewd exhibition of the genitals and, therefore, depicts sexual conduct, as defined by the statute, and falls within the statutory definition of a pornographic work. The district court did not err in finding appellant guilty of use of a minor in a pornographic work and possession of a pornographic work involving a minor.

Affirmed.