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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1246**

State of Minnesota,  
Respondent,

vs.

Charles D. Soderberg,  
Appellant.

**Filed June 9, 2014  
Affirmed in part, reversed in part, and remanded  
Chutich, Judge**

Hennepin County District Court  
File No. 27-CR-12-18754

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

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Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

## UNPUBLISHED OPINION

**CHUTICH**, Judge

Appellant Charles D. Soderberg challenges his convictions of solicitation of a child to engage in sexual conduct and electronic solicitation of a child to engage in sexual conduct, asserting that the evidence is insufficient to prove his guilt beyond a reasonable doubt. Soderberg also argues that, because the conduct involved a single act and single victim, he should not have been convicted of both counts. Because the evidence sufficiently supports the guilty verdicts, we affirm the district court's determinations of guilt. But because the convictions arose from the same conduct against a single victim, we remand to the district court to vacate one of the convictions.

### FACTS

In 2011, T.T. met Soderberg when they worked together at a restaurant in Richfield. T.T. and Soderberg became friends and socialized together outside of work. Soderberg confided in T.T. that he is gay.

T.T. learned that Soderberg also worked as a carpenter and that he hired young people to help him with the work. T.T. connected her son, J.T., with Soderberg so that J.T. could make some extra money. J.T. began doing handyman work for Soderberg in 2011, continuing through the early summer of 2012. J.T. was 15 years old in 2012.

In the early morning hours of June 8, 2012, J.T. received a text from an unknown number that stated, "Hey your [sic] so cute." J.T. and the unknown texter, later determined to be Soderberg, exchanged many texts over the next few hours. The

messages referred to the size of J.T.'s penis, masturbating, and "looking for some quick fun."

The unknown texter gave J.T. an e-mail address, which J.T. looked up online. J.T. found out that Soderberg's Facebook page listed that e-mail address as his own. J.T. began suspecting that the unknown texter may be Soderberg. J.T. testified that he also received two pornographic videos and two graphic photographs of unknown girls from Soderberg during their text-message conversation on June 8. The two photos were introduced as evidence at trial.

Later on June 8, J.T. told his uncle about the text messages, and his uncle told J.T.'s mother; J.T.'s mother then called the police. A police officer came to J.T.'s house and took his statement.

On June 10 and 11, 2012, Soderberg again texted J.T. sexually explicit messages and asked for a picture of J.T.'s penis. A couple of days later, Sergeant Bernard Martinson of the Minneapolis Police Department met with J.T. at J.T.'s home. Sergeant Martinson took J.T.'s phone at that time for further investigation.

The state charged Soderberg with one count of solicitation of a child to engage in sexual conduct and one count of electronic solicitation of a child to engage in sexual conduct. *See* Minn. Stat. § 609.352, subds. 2, 2a(1) (2010). In an interview with the police, Soderberg acknowledged that he owned the e-mail address, that he knew J.T., and that he had texted with him.

In January 2013, the district court held a bench trial. Witnesses for the state included officers from the Minneapolis Police Department; J.T., the minor victim; and T.T., the victim's mother. The parties submitted written closing arguments.

The district court found Soderberg guilty of both counts, sentenced him to 20 months in prison, and stayed execution of the sentence for four years. This appeal followed.

## **D E C I S I O N**

### **I. Sufficiency of the Evidence**

When reviewing a sufficiency-of-the-evidence claim, “our inquiry is limited to whether the fact-finder could have reasonably concluded that the defendant was guilty beyond a reasonable doubt.” *Gulbertson v. State*, 843 N.W.2d 240, 244–45 (Minn. 2014). Viewing the evidence in the light most favorable to the guilty verdict, “we assume that the factfinder disbelieved any testimony conflicting with that verdict.” *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012) (quotation omitted). Assessing witness credibility and determining the weight given to testimony is within the exclusive province of the factfinder. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). On the other hand, “[t]he construction of a statute is clearly a question of law and thus fully reviewable by an appellate court.” *State v. McGrath*, 574 N.W.2d 99, 100 (Minn. App. 1998), *review denied* (Minn. Apr. 14, 1998).

### **A. Solicitation of a Child**

Under the solicitation-of-a-child offense, Soderberg challenges the district court's determinations that he solicited J.T. to engage in sexual contact and sexual performance and that he acted with the requisite intent.

To be guilty of soliciting a child to engage in sexual conduct, the state must prove that (1) the defendant was eighteen years of age or older; (2) the victim was fifteen years of age or younger; (3) the defendant solicited the victim to engage in sexual conduct; and (4) the defendant acted with the intent to engage in sexual conduct. *See* Minn. Stat. § 609.352, subd. 2. "Solicit" means "commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means." *Id.*, subd. 1(c) (2010). "Sexual conduct" means "sexual contact of the individual's primary genital area, . . . or sexual performance as defined in section 617.246." *Id.*, subd. 1(b) (2010).

The evidence supports the findings that Soderberg solicited J.T. to engage in sexual contact and to engage in sexual performance. First, as to soliciting "sexual contact of the individual's primary genital area," Soderberg stated via text message that he wanted to perform oral sex on J.T. and wanted to have "some quick fun," and he referred more than once to the size of J.T.'s penis.

Soderberg contends that nothing in his messages "could be reasonably interpreted as [a] legitimate effort to convince or persuade J.T. to actually take part in a physical sexual encounter with him" and that, because he was posing as a female, it is not rational to conclude that Soderberg was trying to solicit J.T. to engage in homosexual acts. These

arguments are unpersuasive. Given the number of texts and overall content, the district court's conclusion that Soderberg was trying to persuade J.T. to engage in sexual contact is fully supported by the record. The statute does not require that it be likely that the acts would actually occur; it only requires that the defendant "attempt[] to persuade" a young person to engage in them. *See* Minn. Stat. § 609.352, subd. 1(c). Solicitation "is an inchoate activity which permits application of Minn. Stat. § 609.352 to conduct that is in some degree ambiguous." *McGrath*, 574 N.W.2d at 102 (quotation omitted) (holding that "[b]umping into [victim's] hip while graphically describing [appellant's] sexual conduct when he was the same age as [victim] is sufficient to satisfy the requirements of the solicitation statute").

Second, the testimony at trial shows that Soderberg attempted to persuade J.T. to engage in sexual performance. Sexual performance is defined as "any . . . exhibition presented before an audience or for purposes of visual or mechanical reproduction that uses a minor to depict actual or simulated sexual conduct as defined by clause (e)." Minn. Stat. § 617.246, subd. 1(d) (2010). Clause (e), in turn, defines sexual conduct as "lewd exhibitions of the genitals." *Id.*, subd. 1(e)(4) (2010).

Although Soderberg admits that he asked J.T. to send him photographs of J.T.'s penis, he asserts that such a photo was not necessarily an "objectively lewd exhibition of [J.T.'s] genitals." Soderberg asserts that, because he never requested an obscene or indecent photo, the state failed to prove that asking for a photo of J.T.'s penis is a lewd exhibition of the genitals. We disagree.

We have defined “lewd” as “obscene” or “openly lustful or indecent.” *State v. Botsford*, 630 N.W.2d 11, 17 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001); *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 79 (Minn. App. 1985); *see also Black’s Law Dictionary* 991 (9th ed. 2009) (defining “lewd” as “[o]bscene or indecent; tending to moral impurity or wantonness”). 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 College Dictionary* 1123 (4th ed. 2007) (defining “prurient” as “[i]nordinately interested in matters of sex”). “Lustful” means “[e]xcited or driven by lust,” and “lust” means “[i]ntense or unrestrained sexual craving.” *The American Heritage College Dictionary* at 824.

Soderberg asked for a photo from J.T. so that Soderberg could have “something to think about when [he] play[s] with [him]self to go [] to sleep.” Soderberg later asked specifically for a “dick pic” from J.T. All of Soderberg’s text messages were based around flirtatious behavior, sexual pleasure, and J.T.’s appearance, particularly the size of his penis. The evidence supports the finding that Soderberg was attempting to persuade J.T. to send to Soderberg an obscene or openly lustful photo focused only on J.T.’s genitals. Such a photo would not have “serious literary, artistic, political, or scientific value.” *See Botsford*, 630 N.W.2d at 17 (quotation omitted). If J.T. had sent Soderberg a photo of his penis, it would not have been simply an incidental or innocuous photo of

nudity or a photo that was nonsexual in nature. Soderberg attempted to persuade J.T.—a 15-year-old—to send him a close-up photo of his penis in the context of Soderberg “play[ing] with [him]self” and “talk[ing] dirty.” Thus, in these circumstances, the district court could reasonably conclude that Soderberg solicited J.T. to send him a lewd exhibition of J.T.’s genitals.

Lastly, the record shows that Soderberg acted with the intent to engage in sexual conduct. Contrary to Soderberg’s contention, simply because Soderberg knew that J.T. was not gay does not show that Soderberg did not have the requisite intent. Again, the number and content of the text messages show that Soderberg intended to engage J.T. in sexual contact or sexual performance. *See McGrath*, 574 N.W.2d at 101 (holding that “it is a plausible inference that [appellant] intended to engage [victim] in some form of sexual conduct” where “appellant stated that he was ‘horny’ when he was young and explained how he was able to ejaculate ‘five times in a ten minute period,’ while at the same time bumping into [victim’s] hip”).

#### **B. Electronic Solicitation of a Child**

Under the offense of electronic solicitation of a child, Soderberg contests whether the state proved beyond a reasonable doubt that he solicited J.T. to engage in sexual conduct. The relevant elements of this crime are: (1) the defendant was eighteen years of age or older; (2) the victim was fifteen years of age or younger; (3) the defendant used the Internet or a telecommunications system to solicit the victim to engage in sexual conduct; and (4) the defendant acted with the intent to arouse the sexual desire of any person. *See* Minn. Stat. § 609.352, subd. 2a(1). Soderberg does not challenge the

sufficiency of the evidence as to elements one, two, and four, and he does not dispute that he used the Internet or a communications system.

The definitions of “sexual conduct,” “solicit,” and “sexual performance” are the same as for the offense of solicitation of a child as discussed above. *See id.*, subd. 1; Minn. Stat. § 617.246, subd. 1(a). The above analysis thus applies equally to the district court’s findings that Soderberg electronically solicited J.T. The evidence is sufficient to show that Soderberg used the Internet or a telecommunications system to solicit J.T. to engage in sexual conduct.

## **II. Multiple Convictions and Sentences**

Soderberg argues, the state concedes, and we agree that, upon this record, Soderberg may be convicted and sentenced for only one of the two guilty verdicts. Minnesota Statutes section 609.04 provides that “[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2010). The supreme court has interpreted this statute as prohibiting “multiple convictions based on the same conduct committed against the same victim.” *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000).

The warrant of commitment shows that Soderberg was convicted of and sentenced for solicitation of a child and electronic solicitation of a child. Because the only victim involved is J.T. and the parties agree that the two counts involved the same conduct, Soderberg should have been convicted of violating only one of the counts. *See State v. Koonsman*, 281 N.W.2d 487, 489 (Minn. 1979) (holding that it would violate section 609.04 to convict defendant of four counts for one act of criminal sexual conduct); *State*

*v. Levie*, 695 N.W.2d 619, 625 (Minn. App. 2005) (vacating conviction of attempted use of a child in a sexual performance when appellant was also convicted of solicitation of a child to engage in sexual conduct and “identical facts were used to fulfill the essential elements of” both convictions).

We therefore affirm the underlying guilty verdicts, but conclude that one of the judgments of conviction and its corresponding sentence must be vacated. *See State v. Earl*, 702 N.W.2d 711, 723–24 (Minn. 2005). Because the parties have not presented arguments as to which conviction should be vacated, we remand the case to the district court to determine which of the two convictions to vacate.

**Affirmed in part, reversed in part, and remanded.**