STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0401

State of Minnesota,
Respondent,

vs.

Kabika Fiston Kakosso,
Appellant.

Filed December 24, 2012
Affirmed
Kirk, Judge

Ramsey County District Court
File No. 62-CR-11-9359

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

Sara R. Grewing, St. Paul City Attorney, Tamara Larsen, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Patrick Kittridge, Chief Second District Public Defender, M.B. Knudsen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Kirk, Judge.

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

KIRK, Judge

On appeal from his conviction of indecent exposure in violation of Minn. Stat. § 617.23, subd. 1(3) (2010), appellant argues that the statute is unconstitutionally vague and overbroad. We affirm.

FACTS

In November 2011, appellant Kabika Fiston Kakosso used a computer at a public library to view a photograph of a penis. A library patron approached a police officer who was working at the library and reported that appellant was viewing pornography on the computer. Two librarians observed a picture of a penis on appellant's computer screen and one of the librarians stated that she was offended by what she saw. As the officer approached appellant, she saw appellant try to close the picture he was viewing. Before he could do so, the officer saw the words "free porn" on the computer screen. There were several children, aged four to seven, in the area at the time. Appellant was charged with indecent exposure in violation of Minn. Stat. § 617.23, subd. 1(3), and disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1 (2010).

In February 2012, appellant moved for dismissal, arguing that section 617.23, subdivision 1(3), is unconstitutionally overbroad and void for vagueness. The district court denied the motion. The parties agreed to proceed with a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, and the state dismissed the disorderly conduct charge. The district court found appellant guilty of indecent exposure and sentenced him to 51 days in jail and a fine of $50, with credit for 51 days served. This appeal follows.

D E C I S I O N

This court reviews the constitutionality of a statute de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). Minnesota statutes are presumed to be constitutional and will only be declared unconstitutional when it is absolutely necessary. *Id.* However, laws that restrict an individual's First Amendment rights are not presumed constitutional. *State v. Botsford*, 630 N.W.2d 11, 15 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). Content-based regulation of speech is presumptively unconstitutional. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992). The state has the burden of proving that such a law is constitutional. *Botsford*, 630 N.W.2d at 15.

The First Amendment of the United States Constitution guarantees the freedom of speech. U.S. Const. amend. I. But the First Amendment does not absolutely protect all speech. *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 1547 (2003). As a result, states may regulate certain categories of speech. *Id.* Speech that is obscene is not protected by the First Amendment and may be regulated. *State v. Davidson*, 481 N.W.2d 51, 57 (Minn. 1992).

Appellant was charged with violating section 617.23, subdivision 1(3), which provides in relevant part that a person is guilty of a misdemeanor if he or she "engages in any open or gross lewdness or lascivious behavior, or any public indecency" in a "public place, or in any place where others are present." Minn. Stat. § 617.23, subd. 1(3).

I. The district court did not err in determining that section 617.23 is not unconstitutionally overbroad.

Appellant argues that section 617.23 is unconstitutionally overbroad. "A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). A defendant may challenge a statute under the overbreadth doctrine on its face and as it is applied to him. *Id.*

This court has previously considered whether section 617.23 is overbroad on its face. *See State v. Duncan*, 605 N.W.2d 745, 749-50 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000); *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78 (Minn. App. 1985). In *Duncan*, nude dancers and patrons at a nude dancing bar were convicted of violating Minn. Stat. § 617.23(a)(3) (1996). 605 N.W.2d at 747. On appeal, they claimed that the statute was overbroad on its face. *Id.* at 749. This court determined that "lewd and lascivious behavior is synonymous with obscene behavior," and, therefore, "behavior that is lewd and lascivious is not constitutionally protected." *Id.* at 750. This court concluded that section 617.23(a)(3) is not overbroad on its face and it was not unconstitutionally applied to the appellants. *Id.*

In *Fetchenhier*, the defendant was charged with lewd and indecent behavior for conduct that involved touching a woman's upper thigh and buttocks in a store. 363 N.W.2d at 77. The district court dismissed the complaint after ruling that section 617.23 was unconstitutionally vague. *Id.* Considering both overbreadth and vagueness, this court determined that the appellant could not raise an overbreadth challenge, stating that

he "does not identify any conduct protected under the First Amendment which Minn. Stat. § 617.23 purports to regulate, nor do we envision any such application." *Id.* at 78. This court also concluded that section 617.23 is not unconstitutionally vague. *Id.* at 79.

A. Constitutionally protected activity.

Appellant argues that section 617.23 is overbroad because it punishes non-criminal activity that is constitutionally protected, including "naked conjugal sex, nudist colonies, and looking at items in public libraries, public museums, and the facades of public buildings." We disagree. Section 617.23 only regulates obscene behavior that occurs in a public place or a place where other people are present. *See* Minn. Stat. § 617.23, subd. 1; *see also Duncan*, 605 N.W.2d at 750 (stating that "lewd and lascivious behavior is synonymous with obscene behavior"). The statute does not reach conduct that is not obscene and conduct that takes place in private.

Further, government regulation of obscene expression is limited. *Botsford*, 630 N.W.2d at 17 (citing *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973)). Minnesota law defines obscenity as "work [that], taken as a whole, appeals to the prurient interest in sex and depicts or describes in a patently offensive manner sexual conduct and which, taken as a whole, does not have serious literary, artistic, political, or scientific value." Minn. Stat. § 617.241, subd. 1(a) (2010). Under this statute, items in public libraries, museums, and the facades of public buildings are excluded from the definition of obscenity because they have "serious literary, artistic, political, or scientific value." *See id.* Appellant has not identified any constitutionally protected activity that section 617.23 prohibits.

B. Traditions of the community.

Appellant contends that section 617.23 is overbroad because it punishes activity that is protected by community traditions and understanding, including public libraries and art in the public domain. We disagree.

To determine that a work is obscene, the trier of fact must find "that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex." Minn. Stat. § 617.241, subd. 1(a)(1). The trier of fact must also find that the work "lacks serious literary, artistic, political, or scientific value." *Id.*, subd. 1(a)(3). The indecent-exposure statute does not reach art in the public domain because it is work that has serious artistic value. It also does not reach much of the material that can be found in a public library because that work has literary, artistic, political, or scientific value. However, section 617.23 reaches work that can be found in a public library if it meets the definition of obscenity. *See id.*, subd. 1(a).

Appellant further argues that because pictures of penises are routinely and legitimately available on the Internet, these images are part of the common culture of the community. But the fact that these images are available on the Internet does not mean that an average person, applying community standards, would not find that the images appeal to the prurient interest in sex. A great deal of information is available on the Internet, including material that is illegal and obscene, and the fact that it is available does not mean that it is not obscene. As the state points out, there is no national community standard for what constitutes obscenity; instead, the standards of a community are determined by the trier of fact. *Miller*, 413 U.S. at 30, 93 S. Ct. at 2618.

In Minnesota, obscene conduct is generally prohibited. *See Duncan*, 605 N.W.2d at 748. Moreover, section 617.23 does not prohibit an individual from viewing all penis images that can be found on the Internet. It only prohibits engaging in lewd or lascivious behavior in public. Images that have literary, artistic, political, or scientific value and images that are viewed in private are not encompassed by the statute.

C. Alternatives to criminalization.

Appellant argues that section 617.23 is overbroad because there are alternatives to criminalizing the behavior, including following the public library system's Internet-use policy. In making this argument, appellant references United States Supreme Court precedent that "[a] statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665, 124 S. Ct. 2783, 2791 (2004) (quotation omitted). In such cases, the government has the burden to prove that proposed alternatives to a content-based speech restriction will not be as effective as the challenged statute. *Id.*

Appellant fails to acknowledge that the government may regulate obscene behavior. *See Davidson*, 481 N.W.2d at 57. Obscenity may "be regulated because of [its] constitutionally proscribable content," but not because it is a "categor[y] of speech entirely invisible to the Constitution, so that [it] may be made the vehicle[] for content discrimination unrelated to [its] distinctively proscribable content." *R.A.V.*, 505 U.S. at 383-84, 112 S. Ct. at 2543 (emphasis omitted). For example, "the government may

proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384, 112 S. Ct. at 2543. Here, section 617.23 restricts all obscene behavior that occurs in public, not just certain content-based types of obscenity. Thus, the government is not required to prove that it used the least restrictive means of achieving the statute's purpose.

D. As applied to appellant.

In addition to his argument that section 617.23 is overbroad on its face, appellant argues that the statute is overbroad as applied to him. The district court concluded that appellant engaged in lewd, lascivious, or indecent behavior within the meaning of section 617.23, subdivision 1(3), because he "view[ed] a representation of a penis on a website labeled 'Free Porn,' on a public library terminal in an area where several members of the public [we]re present, and which a librarian present describe[d] as offensive."

The stipulated facts support the district court's findings. And the conduct that appellant was engaged in satisfies the definition of obscenity. *See* Minn. Stat. § 617.241, subd. 1(a). First, it involved material that an average person, applying contemporary community standards, would find appealed to the prurient interest in sex. *See id.*, subd. 1(a)(1). The record establishes that appellant was viewing an image of a penis with the words "free porn" on the screen, and a librarian was offended. Second, appellant's conduct satisfies the definition of "sexual conduct." *See id.*, subd. 1(b)(3) (2010) (stating that sexual conduct includes "[m]asturbation, excretory functions, or lewd exhibitions of the genitals including any explicit, close-up representation of a human genital organ").

Finally, there is no evidence in the record that the material appellant was viewing had any serious literary, artistic, political, or scientific value. *See id.*, subd. 1(a)(3).

In sum, section 617.23 is not overbroad as it is applied to appellant. It also is not overbroad on its face because it does not regulate constitutionally protected activity or proscribe conduct that is protected by community traditions. The district court did not err in determining that section 617.23 is not unconstitutionally overbroad.

II. The district court did not err in determining that section 617.23 is not unconstitutionally vague.

Appellant argues that section 617.23 is unconstitutionally vague. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quotation omitted). "[A] law is impermissibly vague when it fails to draw a reasonably clear line between lawful and unlawful conduct." *Fetchenhier*, 363 N.W.2d at 78.

A. Sufficient definiteness such that an ordinary person can understand.

Appellant argues that section 617.23 is not defined with sufficient definiteness such that an ordinary person can understand what conduct is illegal. "[T]he vagueness doctrine is based in fairness and is not designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *State, City of Minneapolis v. Reha*, 483 N.W.2d

688, 691 (Minn. 1992) (quotation omitted). On appeal, this court considers whether a statute is vague based on an examination of the appellant's charged conduct. *Fetchenhier*, 363 N.W.2d at 79.

In *Fetchenhier*, this court considered whether section 617.23 is void for vagueness, and concluded that it was not vague because an ordinary person could have no doubt that the defendant's charged conduct of fondling a woman's thigh and buttocks was prohibited by the statute. *Id.* at 79. This court determined that the terms "lewdness," "lasciviousness," and "indecency" all "have a reliable and sufficiently definite meaning to the ordinary citizen which clearly encompasses [the defendant's] conduct." *Id.*

Here, appellant used a computer at a public library to view an image of a penis on the Internet. While appellant's conduct was arguably not as serious as some conduct that the statute encompasses, appellant's argument that an ordinary person would not understand that looking at a picture of a penis is prohibited is simplistic. Appellant viewed the image on a website where the words "free porn" appeared. While he did so, several other people, including children, were in the area. In addition, he hastily attempted to close the website as two librarians and a police officer approached him. In that context, like the defendant in *Fetchenhier*, appellant could have no reasonable doubt that his actions were "open or gross lewdness or lascivious behavior, or any public indecency." *See* Minn. Stat. § 617.23, subd. 1(3).

B. Arbitrary and discriminatory enforcement.

Appellant argues that section 617.23 allows arbitrary and discriminatory enforcement. This issue should typically be determined by the district court prior to trial

because it does not go to a defendant's guilt or innocence. *City of Minneapolis v. Buschette*, 307 Minn. 60, 66, 240 N.W.2d 500, 503 (1976). It is the defendant's burden to produce evidence of discrimination by a clear preponderance of the evidence. *Id.* The defendant must establish "that he was singled out for enforcement and that his selection was invidious or in bad faith." *State v. Hyland*, 431 N.W.2d 868, 873 (Minn. App. 1988).

Appellant argues that, because he is a handicapped, homeless African-American male, he has been subject to "inordinate scrutiny" on multiple occasions, his mere presence in St. Paul is considered by some to be a crime, and he has been "hounded." He further contends that section 617.23 is not enforced in a routine or consistent manner. There is no evidence in the record to support these contentions. Appellant has not met his burden of producing evidence that he was singled out for enforcement of the statute and that the discrimination was invidious or in bad faith.

In addition, this court generally will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). While appellant raised a similar argument in his memorandum to the district court in support of his motion to dismiss, the parties never argued the issue before the district court and the court did not address the issue.

Accordingly, we conclude that the district court did not err in determining that section 617.23 is not unconstitutionally vague.

Affirmed.