STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0662

State of Minnesota,
Respondent,

vs.

Scott Alan Anderson,
Appellant.

Filed April 14, 2014
Affirmed
Chutich, Judge

Anoka County District Court
File No. 02-CR-11-9173

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

CHUTICH, Judge

Appellant Scott Alan Anderson appeals his convictions of second-degree criminal sexual conduct, solicitation of a child to engage in sexual conduct, and fifth-degree

criminal sexual conduct, asserting that the district court plainly erred in instructing the jury and that the evidence was insufficient to prove fifth-degree criminal sexual conduct against one of the victims. Because the instructions were not plainly erroneous and the evidence sufficiently proved fifth-degree criminal sexual conduct, we affirm.

FACTS

In 2011, H.L. visited her mother and stepfather, appellant Scott Anderson, at their house every other weekend. H.L.'s friend, J.A., occasionally spent the night there with H.L. Around August 2011, when H.L. and J.A. were 11 years old, Anderson twice showed H.L. his penis.

Also in 2011, Anderson bought a vibrator and gave it to H.L. He told her to "use it" and to "put it down where your [vagina is]," inside the vagina and "[r]ight in the middle." H.L. put the vibrator, while it was on, underneath her underwear on her vagina. Anderson "was sitting there [and] smiling" while she did so. After she stopped using it because it hurt, "[Anderson] licked it," said "it was good," and then "hid it."

Another time in 2011 when H.L. and J.A. were both at Anderson's home, they watched a movie with Anderson when H.L.'s mother was asleep. During the movie, J.A. saw Anderson masturbating while he was under a thin blanket. Anderson told her that he was "rubbing himself." J.A. testified that it looked like he was "punching something" and that, even though she could not see his hand, he "was in the private area and you could see like the marking of his fist in the blanket." Anderson told J.A. to "try it," which she understood to mean that she should "hit" herself too.

H.L. and J.A. told J.A.'s mother about these incidents. J.A.'s mother and H.L.'s father and grandparents reported the sexual episodes to the police.

On December 9, 2011, the state charged Anderson with one count of solicitation of a child to engage in sexual conduct and two counts of fifth-degree criminal sexual conduct (masturbation or lewd exhibition of genitals in presence of minor). *See* Minn. Stat. §§ 609.352, subd. 2, .3451, subds. 1(2), 2 (2010). On June 5, 2012, the state added a charge of second-degree criminal sexual conduct (sexual contact with minor under 13). *See* Minn. Stat. § 609.343, subds. 1(a), 2(a) (2010).

A jury found Anderson guilty of all four counts. Anderson moved to vacate the verdict and judgment or for a new trial on the solicitation and second-degree criminal sexual conduct convictions. The district court denied his motion. The district court sentenced Anderson to 36 months in prison, stayed for 25 years, for the conviction for second-degree criminal sexual conduct and one year in jail for each of the convictions for fifth-degree criminal sexual conduct. This appeal followed.

D E C I S I O N

I. Jury Instructions

Anderson alleges that the district court failed to instruct the jury on key elements of solicitation and second-degree criminal sexual conduct. Because he did not object to the jury instructions at trial, we review the instructions for plain error. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). "Under this standard, we may review an unobjected-to error only if there is (1) error; (2) that is plain; and (3) that affects substantial rights." *Id.* at

655–56. If these three prongs are met, "we then decide whether we must address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted).

District courts have "considerable latitude" in selecting jury instructions. *State v. Mahkuk*, 736 N.W.2d 675, 681 (Minn. 2007). In our analysis, "we review the jury instructions in their entirety to determine whether the instructions fairly and adequately explain the law of the case." *Milton*, 821 N.W.2d at 805 (quotation omitted). "An instruction is error if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). A jury-instruction error "is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). If a jury instruction eliminates a required element of the crime, the error is not harmless beyond a reasonable doubt. *Mahkuk*, 736 N.W.2d at 682.

A. Plain Error

1. Second-Degree Criminal Sexual Conduct

Anderson argues that the district court should have instructed the jury that H.L.'s "touching of herself was 'effected by a person in a position of authority, or by coercion, or by inducement if the complainant is under 13 years of age,'" quoting a portion of the definition of "sexual contact."[1]

[1] The definition of "sexual contact" states, in relevant part:

> (a) "Sexual contact," for the purposes of sections 609.343, subdivision 1, clauses (a) to (f) . . . includes any of the following acts committed without the complainant's consent,

Anderson was charged with and convicted of violating subdivision 1(a) of Minnesota Statutes section 609.343. The state correctly contends that this provision does not require Anderson to have been in a position of authority. Subdivision 1(b) of section 609.343, by contrast, does require that the defendant be in a position of authority: "the actor is more than 48 months older than the complainant and in a position of authority over the complainant." *Id.*, subd. 1(b) (2010). But the state did not charge Anderson under subdivision 1(b).

In addition, subdivision 1(a) specifically provides that "the state is not required to prove that the sexual contact was coerced." *Id.*, subd. 1(a). Thus, the jury instructions accurately stated the following relevant portion of the sexual-contact definition: "the touching by the complainant of . . . the complainant's . . . intimate parts effected . . . by inducement if the complainant is under 13 years of age." Minn. Stat. § 609.341, subd. 11 (2010).

The district court properly substituted the word "caused" for "induced" in its instructions. "In discerning the plain and ordinary meaning of a word or phrase . . . , we consider the common dictionary definition of the word or phrase." *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011). The definition of "induce" in *The American Heritage*

> except in those cases where consent is not a defense, and committed with sexual or aggressive intent:
> . . .
> (ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by a person in a position of authority, or by coercion, or by inducement if the complainant is under 13 years of age or mentally impaired, ...

Minn. Stat. § 609.341, subd. 11 (2010).

Dictionary is: (1) "To lead or move, as to a course of action, by influence or persuasion"; (2) "To bring about or stimulate the occurrence of; cause"; (3) "To infer by inductive reasoning." *The American Heritage Dictionary* 896 (5th ed. 2011). Anderson does not cite authority, other than the statutory definition of "sexual contact," for his assertion that the instruction must include the word "induce." Because "cause" and "induce" are synonymous in these circumstances, the district court accurately stated the law. *See Moore*, 699 N.W.2d at 736.

2. Solicitation of a Child

Anderson next asserts that the district court should have instructed the jury in its solicitation instruction that H.L.'s "penetration of herself with an object was 'effected by a person in a position of authority, or by coercion, or by inducement,'" quoting part of the definition of "sexual penetration." In support, he emphasizes subsection (2)(ii) of the definition of "sexual penetration:"

> any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:
> (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
> (2) *any intrusion however slight into the genital or anal openings:*
> (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose; [or]
> (ii) *of the complainant's body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired*; . . . .

Minn. Stat. § 609.341, subd. 12 (2010) (emphasis added).

The district court's instructions to the jury fit the statutory definition of sexual penetration, specifically subdivisions 12(1) and 12(2)(i). *See id.* Anderson argues that the jury should have been instructed on subdivision 12(2)(ii), but we do not believe that the omission is plain error. The statute lists the manners of "intrusion" disjunctively—the different scenarios are connected by the word "or"—so the district court is not required to instruct the jury on all of the possible ways that intrusion may occur. *See State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000) ("We have long held that in the absence of some ambiguity surrounding the legislature's use of the word 'or,' we will read it in the disjunctive and require that only one of the possible factual situations be present in order for the statute to be satisfied.").

Because the district court instructed the jury on two of the ways that sexual penetration could occur in a disjunctive statute, the district court did not plainly err in omitting this other definition of penetration. Moreover, because the facts here more closely fit the omitted portion of section 609.341—subdivision 12(2)(ii)—the omission was, if anything, helpful to Anderson.

B. Uncharged Conduct

Anderson contends that, because the jury instructions were erroneous, the jury may have convicted him for the "uncharged conduct wherein J.A. alleged that appellant touched H.L.'s private parts." He cites *State v. Stempf*, in which we held that the district court's refusal to give a "specific unanimity instruction" violated the defendant's right to a unanimous verdict. 627 N.W.2d 352, 358 (Minn. App. 2001). The unlawful-possession statute at issue in that case, however, "makes the act of possession an element

of the crime," and, thus, "the jury must agree unanimously on one act of possession that has been proven beyond a reasonable doubt." *Id.* at 357. We reversed because the state argued in closing that the jury "could convict if some jurors believed appellant possessed the methamphetamine found on the premises while others believed he possessed the methamphetamine found in the truck." *Id.* at 358. But the state had charged the defendant with only one count of possession, and the district court refused to give a unanimous-verdict instruction. *Id.* at 357–58.

This case is distinguishable from *Stempf*. Anderson did not request a unanimous-verdict instruction, and the state asserted that only one act supported the convictions of second-degree criminal sexual conduct and solicitation. In its closing argument, the state argued to the jury that it should find Anderson guilty of these offenses because of Anderson's behavior related to the vibrator. The prosecutor did not once mention in closing J.A.'s testimony that she saw Anderson touch H.L.'s genital area. It is not likely that the jury convicted Anderson based on J.A.'s statements when the state clearly set out the behavior that it alleged was criminal in its opening statement and closing argument.

Anderson alleges that the jury "obviously considered the uncharged conduct" because of the question it submitted to the district court:

> Judge . . . . Definition. Criminal sexual conduct in the second degree. The first element reads: ". . . or caused the touching of [H.L.'s] intimate parts or the clothing . . ."
>
> Question: Would [H.L.] participating in any masturbatory act be included in this definition or does it only include the defendant physically touching [H.L.'s] intimate parts?

But the jury's question shows that it was focused on the masturbatory conduct related to the vibrator and not J.A.'s statements about physical touching. Thus, no reversible error occurred.

II. Sufficiency of the Evidence

Anderson next argues that the evidence was insufficient to prove fifth-degree criminal sexual conduct because J.A. "was not reasonably capable of viewing [his] actions" when he masturbated in the chair in front of the girls. When reviewing an insufficient-evidence argument, we determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to allow the jury to convict. *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012). "In making this determination, we assume that the factfinder disbelieved any testimony conflicting with that verdict." *Id.* (quotation omitted). "The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the factfinder could reasonably have found the defendant guilty of the charged offense." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted).

Anderson claims that the evidence does not support the "presence" requirement of fifth-degree criminal sexual conduct because J.A. could not see what was occurring underneath the blanket. A person is guilty of this offense if "the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451, subd. 1(2). A conviction for criminal sexual conduct in the fifth degree "only requires that the accused's conduct be reasonably capable of being viewed by a minor." *State v.*

Stevenson, 656 N.W.2d 235, 239–40 (Minn. 2003). Before affirming the defendant's conviction, the *Stevenson* court considered the meaning of the phrase "in the presence of a minor." *Id.* at 238. The supreme court concluded that "the plain meaning of the presence requirement is necessarily broader than 'actually viewed by a minor[.]' . . . The legislature was capable of narrowing the presence requirement by specifically stating that the conduct must actually be viewed by a minor, but it did not do so." *Id.* at 239.

Applying *Stevenson*, Anderson's masturbation in the same room as J.A. was reasonably capable of being viewed by J.A. While the supreme court in *Stevenson* affirmed a conviction of *attempted* fifth-degree criminal sexual conduct, the holding of that case does not require J.A. to have directly seen what was going on underneath the blanket. *See id.* at 239–40. Here, the evidence at trial supports the conviction for fifth-degree criminal sexual conduct. J.A. testified that she saw Anderson "hitting himself" or "punching" himself in his genital area while he was under a thin blanket and that Anderson told her that he was "rubbing himself." Although she could not see his hand, he "was in the private area," and J.A. could see "the marking of his fist in the blanket." This testimony supports the jury's determination that Anderson masturbated in the presence of a minor under the age of 16 when he knew the minor was present. *See* Minn. Stat. § 609.3451, subd. 1(2).

Affirmed.