STATE OF MINNESOTA

IN SUPREME COURT

A16-0830

Court of Appeals

McKeig, J.
Dissenting, Anderson, J., Gildea, C.J.
Took no part, Thissen, J.

State of Minnesota,

Respondent,

vs.

Filed: August 8, 2018
Office of Appellate Courts

Daniel Joseph Decker,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Laura E. Isenor, Assistant County Attorney, Owatonna, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. "Presence of a minor," for purposes of fifth-degree criminal sexual conduct and indecent exposure, includes simultaneous online communications with a minor.

2. An adult who transmits a likeness of the adult's own genitals to a minor during simultaneous online communication may be convicted of both fifth-degree criminal sexual conduct and indecent exposure.

Affirmed.

O P I N I O N

MCKEIG, Justice.

Daniel Decker was convicted of fifth-degree criminal sexual conduct and indecent exposure for sending a picture of his genitals to a minor via Facebook Messenger. He appeals, arguing that he did not meet the "presence" requirement of either crime because he and the victim were in different physical locations, and because he only sent a likeness of his genitals, rather than exposing his actual genitals. We hold that Decker's simultaneous electronic communications with a minor are sufficient to support his convictions. We therefore affirm the decision of the court of appeals.

FACTS

In the summer of 2014, 14-year-old M.J. babysat for a couple that she met through her sister. During that same summer, Decker moved into the couple's home, and he and M.J. became friends on Facebook. At the time, Decker was 34 years old, and was aware of M.J.'s age.

On September 8, 2014, Decker sent M.J. a video via Facebook Messenger at 12:51 a.m. The video showed only Decker's face, and he asked M.J., "[W]hat's up? Shouldn't you be in bed by now?" Decker explained that he was "just kicking it" and "fixing to go to sleep," and winked at the end of the video. Decker and M.J. then exchanged messages for roughly four minutes, until Decker informed her that he was going to finish "what [he] just started before [he] said hey." When M.J. asked what he meant, Decker explained that he was referring to his nightly ritual to de-stress before falling asleep. M.J. thought that Decker was referring to smoking marijuana, but asked what his ritual was, and he

responded, "[i]t's embarrassing kinda." M.J. did not respond to that message, but one minute later, Decker sent M.J. a picture of his erect penis.

Decker was charged with and found guilty by a jury of fifth-degree criminal sexual conduct, under Minn. Stat. § 609.3451, subd. 1(2) (2016), and indecent exposure, under Minn. Stat. § 617.23, subds. 1(1), 2(1) (2016). He appealed, arguing that the convictions must be reversed because (1) he was not physically present with M.J. and (2) he only sent M.J. a likeness of his genitals, rather than exposing his actual genitals.[1] The court of appeals affirmed both convictions. Regarding the fifth-degree criminal sexual conduct conviction, the court of appeals opined that "the history of changes in [Minn. Stat. § 609.3451], public policy underlying that statute, and . . . recent caselaw all support an interpretation that the statutory term 'present' encompasses online activity with a minor." *State v. Decker*, No. A16-0830, 2017 WL 1833239, at *4 (Minn. App. May 8, 2017). The court of appeals also affirmed Decker's indecent exposure conviction, because the picture was transferred to M.J.'s phone within one minute of being taken and Decker and M.J. were simultaneously on their phones. *Id.* at *6. We granted review.

ANALYSIS

Decker's appeal requires us to interpret Minn. Stat. §§ 609.3451, 617.23 (2016). Statutory interpretation is a question of law, which we review de novo. *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018).

[1] Decker took several pictures of his genitals at 12:49 a.m. on September 8, 2014. He did not send one of those pictures to M.J. until 1:03 a.m., and thus argues that the picture he sent is merely a *likeness* of his genitals.

I.

Fifth-degree criminal sexual conduct includes "engag[ing] in . . . 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). Indecent exposure includes "willfully and lewdly expos[ing] the person's body, or the private parts thereof," Minn. Stat. § 617.23, subd. 1(1), and is a gross misdemeanor if such exposure occurs "in the presence of a minor under the age of 16" *id.*, subd. 2(1). Decker argues that the State failed to prove that he committed either crime, because he was not in M.J.'s presence.

We have previously recognized that the term "presence" is ambiguous. *See State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003) ("[T]he term 'presence' may be used to mean different things in different statutes.").[2] When a statute is ambiguous, we apply

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[2] The dissent argues that *Stevenson*'s holding that "presence" is ambiguous does not apply here, because the minors and the defendant in *Stevenson* were in the same physical location, whereas Decker and M.J. were not. We reject this argument for three reasons. First, "[o]ur previous interpretation of a statute guides us in determining its meaning." *Engquist v. Loyas*, 803 N.W.2d 400, 404–05 (Minn. 2011). In *Stevenson*, we interpreted the same statutes at issue here, Minn. Stat. §§ 609.3451, 617.23. *Stevenson*, 656 N.W.2d at 238, 240.

Second, the very definitions that the dissent cites create reasonable but conflicting applications. *See Webster's Third New International Dictionary* 1793 (2002) (defining "presence," alternately, as "the state of being in front of or in the same place as someone or something" and "the condition of *being within sight* or call" (emphasis added)). Through the aid of technology, such as telescopes, binoculars, drones, or the Internet, a person can be within sight, and therefore "present" without being "in the same place as someone." *See id.* Because there is more than one reasonable interpretation of "presence," even under the dissent's cited definitions, the term "presence" is ambiguous. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017).

canons of statutory construction to ascertain its meaning. *State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017). Specifically, we may consider the canons provided by the Legislature in Minn. Stat. § 645.16 (2016). *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). These canons include "the mischief to be remedied," "the object to be attained," and "the consequences of a particular interpretation." Minn. Stat. § 645.16; *see also Chapman v. Davis*, 45 N.W.2d 822, 825 (Minn. 1951) (same). All three of these canons support the court of appeals' conclusion that "presence" as used in these statutes extends to simultaneous online communications between the defendant and a minor victim.

The Legislature has recognized the harms of indecent exposure, and has determined that minors under the age of sixteen are entitled to additional protections. *Compare* Minn. Stat. § 617.23, subd. 1 (categorizing indecent exposure as a misdemeanor) *with id.*, subd. 2(1) (categorizing indecent exposure committed "in the presence of a minor under the age of 16" as a gross misdemeanor). Thus, the mischief that Minn. Stat. §§ 609.3451, 617.23 seek to remedy is adults lewdly exposing themselves to children. Likewise, the object to be attained by these statutes is to deter adults from such behavior. The consequences of Decker's proposed interpretation, however, would severely undercut these goals. If we adopted Decker's interpretation of Minn. Stat. §§ 609.3451, 617.23, we would effectively

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Third, the dissent's argument that the perpetrator and the victim must be face-to-face runs counter to our holding in *Stevenson*. In *Stevenson*, we rejected the argument that "presence" meant "proximity," and instead held that, on those facts, "presence" meant "reasonably capable of being viewed." 656 N.W.2d at 239. Because we have held that being "in the presence of a minor" does not necessarily require "proximity," we decline the dissent's invitation to require the minor and the adult to be in the same physical space.

create an exception that allows adults to expose themselves to minors via the Internet without consequence.[3] Such an exception would substantially undermine legislative efforts to protect minors, and is therefore contrary to the Legislature's intent.

In this case, Decker took several lewd images of himself in an aroused state at 12:49 a.m., and began a conversation with 14-year-old M.J. two minutes later. Decker knew that M.J. was 14, and he knew that she was awake and logged into Facebook Messenger. He specifically chose to engage in near-simultaneous conversation with M.J., and thus used technology to effectively enter M.J.'s private room. To end their conversation, Decker said that he would be resuming his nightly ritual, which he admitted was "embarrassing." One minute later, Decker sent M.J. a picture of his genitals. Decker chose to converse with M.J., who he knew was a minor under the age of 16, and he chose to send her a picture of his genitals right after implying that he had been masturbating before the conversation started. Decker's conduct meets the requirements of Minn. Stat. §§ 609.3451, 617.23, and

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[3] The dissent argues that Minn. Stat. § 609.352 (2016) (criminalizing the electronic communication of sexually explicit materials to minors) and Minn. Stat. § 617.241 (2016) (criminalizing obscenity) could address cases such as this one. "It is well settled that the same act may constitute an offense . . . under several different statutes, and the prosecutor may proceed under whichever . . . statute he sees fit." *State v. Holt*, 72 N.W. 700, 701 (Minn. 1897). We are not convinced, however, that either statute properly applies to the facts presented by this case.

Section 609.352, subdivision 2a, requires proof of "the intent to arouse the sexual desire of any person," and the record does not reflect whether Decker had any such intent. Section 617.241 does criminalize the knowing exhibition and distribution of obscene material, including photographs, but neither mentions children nor provides increased penalties for disseminating obscene photographs to children. Thus, relying on the obscenity statute to prosecute this kind of case would deny effect to the Legislature's intent to punish adults who expose their genitals to children more harshly than adults who expose their genitals to non-consenting adults.

we therefore affirm his convictions.

II.

Decker also argues that Minn. Stat. §§ 609.3451 and 617.23 criminalize only the exposure of actual genitals, not a photographic likeness of genitals. In support of this assertion, Decker argues that the plain meaning of "exhibit," for purposes of Minn. Stat. § 609.3451, is "to show outwardly," "to display," or "to present for others to see." But one can show, display, or present an image to others. Decker's argument that the plain meaning of "expose" is "to make visible" is similarly unhelpful, because one can make an image visible to others. In fact, we have acknowledged that people *can* be exposed to photographs, and that the exposure to such photographs may have legal significance. *See, e.g.*, *State v. Caldwell*, 322 N.W.2d 574, 592 (Minn. 1982) (addressing witnesses' exposure to media photographs of defendant before trial); *State v. Martin*, 211 N.W.2d 765, 766 (Minn. 1973) (holding that it was prejudicial for a jury to be exposed to the defendant's picture in a mug shot photo album). Thus, Decker's arguments about the plain meaning of these two verbs do not vitiate his convictions, and do not change our conclusions in this case.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

THISSEN, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

D I S S E N T

ANDERSON, Justice (dissenting).

The question presented in this appeal turns on the meaning of the phrase "in the presence of a minor." Because the common and ordinary meaning of "presence" requires a shared physical location between the defendant and the minor, and there was no shared physical location here, I would reverse the convictions. The court's contrary conclusion—that a photograph sent via a text message satisfies physical presence—does not square with relevant dictionary definitions or rules of grammar. And the conclusion is not consistent with the common and ubiquitous use of texting (and other means of electronic transmission) to send photographs of family members, athletic events, and other daily occurrences, precisely because the sender and the recipient are not in the same location.

The statutes at issue in this case—the fifth-degree-criminal-sexual-conduct statute and the indecent-exposure statute—prohibit a person from lewdly exposing or exhibiting his or her genitals "in the presence of a minor under the age of 16." Minn. Stat. §§ 609.3451, subd. 1(2), 617.23, subds. 1(1), 2(1) (2016). Appellant Daniel Decker and the child were not in the same physical location when the alleged crimes occurred. Instead, each was at their own home when Decker took a photograph of his genitals and sent it, via text message, to a 14-year-old girl. The plain meaning of the phrase "in the presence of a minor under the age of 16" requires the defendant and the child to be in the same physical location when the defendant exposes or exhibits his or her genitals. Decker's conduct was certainly deplorable, but it did not violate either of these statutes. As a result, I respectfully dissent.

I.

The issue presented in this case is the meaning of the phrase "in the presence of a minor." Decker was convicted of fifth-degree criminal sexual conduct for "engag[ing] 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). He also was convicted of indecent exposure for "willfully and lewdly expos[ing] [his] body or the private parts thereof" "in the presence of a minor under the age of 16." Minn. Stat. § 617.23, subds. 1(1), 2(1). To violate either statute, Decker had to exhibit or expose his genitals "in the presence of a minor."[1]

Statutory interpretation begins with an assessment of whether a statute is ambiguous. *See State v. Thonesavahn*, 904 N.W.2d 432, 435 (Minn. 2017). "When the words of a statute in their application to an existing situation are clear and free from all ambiguity, we give effect to the plain meaning of the law." *State v. Bakken*, 883 N.W.2d 264, 267–68 (Minn. 2016); *see also* Minn. Stat. § 645.16 (2016). A statute is ambiguous only when, "as applied to the facts of the case, it is susceptible to more than one reasonable interpretation." *Bakken*, 883 N.W.2d at 268. To determine whether a statute is ambiguous, we interpret "words and phrases . . . according to the rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08 (2016)

[1] Because the private parts of one's body include the genitals, I will use the term "genitals" in this dissent.

A.

The court concludes that the phrase "in the presence of a minor" is ambiguous, and using the canons of construction, construes it to "extend[] to simultaneous online communication." The court does not explain how the words in the phrase could be interpreted, let alone reasonably interpreted, to mean "simultaneous online communication with a minor." Instead, the court declares that we have already determined "that the term 'presence' is ambiguous."

The court's ambiguity conclusion ignores well-settled law regarding statutory interpretation. Our case law is clear—the ambiguity of a statute is determined based on the specific factual circumstances presented. *See, e.g.*, *Sorchaga v. Ride Auto, LLC*, 909 N.W.2d 550, 555 (Minn. 2018) ("The words of a statute are ambiguous only 'if, *as applied to the facts of the particular case*, they are susceptible to more than one reasonable interpretation.' " (emphasis added) (quoting *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012))); *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015) ("A statute is unambiguous if, *as applied to the facts of a case*, it is not 'susceptible to more than one reasonable interpretation.' " (emphasis added) (quoting *A.A.A. v. Minn. Dep't of Human Servs.*, 832 N.W.2d 816, 819 (Minn. 2013))); *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984) ("When the words of a statute or ordinance *in their application to an existing situation* are clear and free from ambiguity, judicial construction is inappropriate." (emphasis added)). We have not determined that the phrase "in the presence of a minor" is ambiguous with respect to the factual

circumstances presented here—when the defendant and the minor are not in the same physical location.

The court's premise is based entirely on *State v. Stevenson*, 656 N.W.2d 235, 237 (Minn. 2003), where an adult saw the defendant masturbating in a truck parked 10 to 15 feet from a playground where children were playing. We considered whether the "presence" language in the fifth-degree-criminal-sexual-conduct and indecent-exposure statutes required the State to prove that the minor actually viewed the defendant's conduct. *Id.* at 239. We concluded that with respect to that circumstance, the presence requirement was ambiguous because it was susceptible to more than one reasonable interpretation. *Id.* Because the defendant in *Stevenson* was in the same physical location as the minors, the court's conclusion that the phrase "in the presence of a minor" was ambiguous does not apply here, given that the defendant and the minor were in different physical locations.[2]

B.

As used in the relevant statutes, the phrase "in the presence of a minor" is a prepositional phrase that modifies the respective verb clauses, which are to "engage in . . . the lewd exhibition of the genitals" or to "willfully and lewdly expose[] the person's" genitals. *See* Minn. Stat. §§ 609.3451, subd. 1(2), 617.23, subds. 1(1), 2(1). The phrase

[2] The court claims *Stevenson*'s conclusion that "presence" was ambiguous applies to the different factual circumstances of this case. As support, it relies on our statement from *Engquist v. Loyas*, 803 N.W.2d 400, 404–05 (Minn. 2011), that "[o]ur previous interpretation of a statute guides us in determining its meaning." But in *Engquist*, we did not address whether a statute was ambiguous. Instead, we relied on "our prior construction" of a statute to determine whether the district court's jury instructions misstated the law. *See id.* at 406–07

therefore indicates where the defendant's exposure or exhibition of his or her genitals must occur.

I first consider whether the phrase "in the presence of a minor" is ambiguous as applied to the facts of this case—taking a lewd photograph of genitals and sending it, via text message, to a minor in another physical location. To resolve this issue, I look to the common and ordinary meaning of the phrase "in the presence of a minor." *See State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016) (stating that to determine plain meaning, we "look to the dictionary definitions of th[e] words and apply them in the context of the statute").

While the noun "presence" has several meanings, the definition that applies to the circumstances of this case is "the state or fact of being present; the state of being in one place and not elsewhere; the condition of being within sight or call, at hand, or in a place thought of; the state of being in front of or in the same place as someone or something."[3] *Webster's Third New International Dictionary* 1793 (2002); *see also Black's Law*

[3] The court concludes that there is more than one reasonable interpretation of "presence" by plucking a few words out of a portion of one of these definitions—"the condition of being within sight or call." According to the court, through the use of technology, including the Internet, a person can be " 'within sight' and therefore 'present' without being 'in the same place as someone.' " This conclusion is flawed for two reasons. First, it ignores the rest of the definition, which when viewed as a whole clearly indicates a shared physical location. *See Webster's*, *supra*, at 1793 (defining "presence," in part as "the condition of being within sight or call, *at hand*, or *in a place* thought of") (emphasis added)). Second, it ignores the facts of this case. While Decker and the child were texting each other from their respective homes, neither could see the other. They were not "within sight" of each other when Decker took a photo of his genitals and texted it to the victim. An act does not occur in the "presence" of someone simply because he or she is sent a photograph of that act.

Dictionary 1302 (9th ed. 2009) (defining "presence" as "the state or fact of being in a particular place and time" or "close physical proximity coupled with awareness"); *Oxford Dictionary of English* 1404 (3rd ed. 2010) (defining "presence" to include "in a particular place" and "existing or occurring in a place or thing"). Thus, the common meaning of "presence" requires a shared physical location.

Based on the common meaning of "presence," the only reasonable interpretation of the phrase "in the presence of a minor" is that the conduct that prepositional phrase modifies must occur in the same physical location as the child. That conduct is the defendant's exposure or exhibition of his or her genitals. *See* Minn. Stat. §§ 609.3451, subd. 1(2), 617.23, subds. 1(1), 2(1). Accordingly, to violate the fifth-degree-criminal-sexual-conduct or indecent-exposure statutes, the defendant and the child must be in the same physical location when the defendant exposes or exhibits his or her genitals.

My interpretation is consistent with that reached by other courts, which have concluded that the phrase "in the presence of a child" requires the defendant to be in the same physical location as the child when the prohibited conduct occurs.[4] *See United States v. Taylor*, 640 F.3d 255, 261–63 (7th Cir. 2011) (Manion, J., concurring) (concluding that an Indiana statute that prohibited a person from fondling their own body in the presence of

[4] Citing *Rabuck v. State*, 129 P.3d 861, 867–68 (Wyo. 2006), the court of appeals stated that "[c]ases from other jurisdictions support a conclusion that 'presence' does not necessarily mean 'physical presence.' " *State v. Decker*, No. A16-083, 2017 WL 1833239, at *3 n.1 (Minn. App. May 8, 2017). The offense at issue in *Rabuck*, however, did not require the State to prove that it was committed "in the presence of a child." Instead, it involved " 'taking immodest, immoral, or indecent liberties with any child.' " *Rabuck*, 129 P.3d at 863 n.1, 867 (quoting Wyo. Stat. Ann. § 14-3-105(a)).

a child required the defendant to be physically present with the child); *United States v. Miller*, 67 M.J. 87, 88-90 (C.A.A.F. 2008) (concluding that to commit the offense of taking liberties with a child, which required that the accused commit the act in the presence of a child, the act must "be committed in the physical presence of the child); *Selfe v. State*, 660 S.E.2d 727, 729 (Ga. Ct. App. 2008) (holding that to prove an act of child molestation, which required the defendant's act to be committed in the presence of a child, the State had to prove that the defendant and the child "were in the physical presence of each other").

The court claims that if we were to interpret the phrase "in the presence of a minor" to mean in the same physical location, it "would effectively create an exception where adults could expose themselves to minors via the Internet without consequence." The court is wrong. Other criminal statutes, which prohibit sexually explicit electronic communications with minors and the distribution of obscene material, apply to such conduct.[5] *See* Minn. Stat. §§ 609.352, 617.241 (2016).

In this case, it is undisputed that Decker was at his residence when he took a photograph of his penis. He then sent the photograph, via text message, to a 14-year-old girl who was at her home. Because Decker and the child were not in a shared physical location, Decker did not exhibit or expose his genitals "in the presence of a minor under the age of 16." As a result, I would reverse Decker's convictions.

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[5] The court claims that "relying on the obscenity statute to prosecute this kind of case would deny effect to the Legislature's intent to punish adults who expose their genitals to children more harshly than adults who expose their genitals to non-consenting adults." This is simply not the case. Decker was convicted of gross misdemeanors, *see* Minn. Stat. §§ 609.3451, subd. 2 (2016), 617.23, subds. 1(1), 2(1), and a violation of the obscenity statute is also a gross misdemeanor, *see* Minn. Stat. § 617.241, subd. 3.

For the foregoing reasons, I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.