

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1130**

State of Minnesota,
Respondent,

vs.

Kevin Wayne Cota,
Appellant.

**Filed May 12, 2025
Affirmed
Worke, Judge**

Pennington County District Court
File No. 57-CR-23-443

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Nathan Haase, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Worke, Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his convictions for possession of child pornography, arguing that the evidence was insufficient to prove that the images were pornographic or that he

knew or had reason to know that the images were pornographic. Appellant also raises several claims in his pro se supplemental brief. We affirm.

FACTS

In early 2023, the Thief River Falls Police Department received several reports that appellant Kevin Wayne Cota was supplying minors with alcohol, tobacco, and marijuana. A mother of one of the minors provided police with her daughter's phone, which had inappropriate messages between Cota and the minor.

Law enforcement then obtained search warrants and discovered several images of unclothed minors on Cota's Facebook account, home computer, and cell phone. Cota had sent photographs of two minors, victim 1 and victim 2, from his phone to his Facebook messenger account. Respondent State of Minnesota charged Cota with four counts of possession of pornographic works involving a minor (three photographs of victim 1 and one photograph of victim 2), in violation of Minn. Stat. § 617.247, subd. 4 (Supp. 2021).

Cota waived his right to a jury trial. At Cota's court trial, officers testified about their investigation. The district court admitted into evidence the four photographs and Cota's statement to police. The district court also listened to phone calls between Cota and his children while Cota was in jail. In a call, Cota talked to his son about his son putting photographs on Cota's computer. Cota told his son how to answer questions about the photographs or to testify that he does not remember. Cota waived his right to testify.

The district court found Cota guilty as charged. The district court determined that the four images constituted pornographic works and that the testimony and evidence demonstrated that Cota knew or had "reason to know" that the images constituted

pornographic works involving a minor. The district court sentenced Cota to 24 months in prison on count 1 and 36 months in prison on count 4. The sentences were stayed for five years. This appeal followed.

DECISION

Sufficiency of the evidence

Photographs are “pornographic works”

Cota argues that the evidence is insufficient to prove that the photographs meet the statutory definition of “pornographic works.”

We use the same standard of review for court trials and jury trials when evaluating the sufficiency of the evidence. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). When evaluating the sufficiency of the evidence, appellate courts review the record to determine “whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the [district court] to reach [its] verdict.” *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). Appellate courts assume that the district court believed evidence that supported the verdict and disbelieved any evidence that conflicted with the verdict. *Id.* This court will not disturb the verdict if the district court, “acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 25-26.

The district court found Cota guilty of four counts of possession of pornographic works involving a minor. *See* Minn. Stat. § 617.247, subd. 4. Under section 617.247, subdivision 4, “[a] person who possesses a pornographic work [involving a minor], . . .

knowing or with reason to know its content and character, is guilty of a felony.” Cota does not dispute that the subjects in the photographs are minors. “Pornographic work” includes a “photograph” that “(i) uses a minor to depict actual or simulated sexual conduct; [or] (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.” Minn. Stat. § 617.246, subd. 1(f) (2020). “Sexual conduct” includes “physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex . . . in an act of apparent sexual stimulation or gratification.” *Id.*, subd. 1(e)(5) (2020).

Cota and the state disagree as to whether the photographs show a minor in an act of apparent sexual stimulation or gratification. Both parties cite *State v. Johnson*, 775 N.W.2d 377 (Minn. App. 2009), *rev. denied* (Minn. Feb. 16, 2010), to support their positions. In *Johnson*, this court stated that the minor’s arms were “crossed under her breasts, [and] passively resting across her upper torso.” 775 N.W.2d at 382. This court determined that the image did not depict sexual conduct because the “contact between [the minor’s] arms and her breasts is incidental to where her arms are resting. The physical contact between [her] forearm and breast is not part of an act of sexual stimulation or gratification.” *Id.*

Here, the district court described the four photographs as follows:

[Photograph 1 shows victim 1] in the shower and shown to be nude from the waist up. She has a soapy substance on her hands and only in her breast area; there is no soap seen on any other part of her body. Her hands have full contact with her breasts, she is leaning forward, and her mouth is open with her tongue fully extended. From the image, it is reasonably inferred that [she] is not simply showering but instead actively

engaged in physical contact with both of her breasts which are erogenous zones that are commonly associated with sexual arousal in an act of apparent sexual stimulation or gratification. [Her] posture in leaning forward and expression with her mouth open and tongue extended in combination with her physical contact with both of her breasts provide the appearance of pleasure or satisfaction in what she is doing.

[Photograph 2 shows victim 1] in the shower and shown nude from the waist up. She has what looks to be a soapy substance on her hands and in visible circular-type patterns around just the circumference of her breasts, with the rest of her chest and body visible in the image being clear from any soap. [Her] posture is more relaxed with her hands still touching her breasts, and she is smiling. [Her] image and the surroundings reflect it was made at the same time as [photograph 1] from which it can be reasonably inferred this image is in a continuum of an act of apparent sexual stimulation or gratification.

[Photograph 3 shows victim1] in the shower and shown nude from the waist up, as she pours soap on her breasts using her right hand while using her left hand to touch the underside of her right breast. [She] is leaning back while holding the soap container close to her face and has her tongue out as if to lick the soap she is pouring from the bottle. From the image, it is reasonably inferred that [she] is utilizing the soap to simulate male ejaculation onto her breast since licking soap is not a reasonable action. Again, [her] image and the surroundings reflect it was made at the same time as [photograph 1] from which it can be reasonably inferred this image is in a continuum of acts of apparent sexual stimulation or gratification.

[Photograph 4 shows victim 2] smiling as she actively utilizes both her hands and arms to lift and hold up her shirt to expose both of her breasts while she appears to touch her right breast with her left hand and she also touches her right nipple with her right hand. [She] is lying in bed on her back which is commonly associated with sexual activity. There are no grooming tasks being performed . . . and the nudity serves no purpose other than for [her] to be unencumbered when touching her breasts which are erogenous zones that are

commonly associated with sexual arousal. [She] is smiling which provides the appearance of pleasure or satisfaction in what she is doing.

Cota asserts that the photographs here are like that in *Johnson* and suggests that the district court confused the minors' "playful, teasing demeanors and touching of their breasts with acts of sexual stimulation or gratification." He claims that their "taunting" and "flirt[y]" behavior can indicate something other than sexual conduct.

Having carefully reviewed the record, we conclude that the district court accurately described the photographs. And, as the state contends, the photographs here are not like that in *Johnson* where the minor's arms were "crossed under her breasts," and the contact between her breasts and arm was incidental. 775 N.W.2d at 382. Here, the contact between the minors' hands and their breasts is purposeful and the acts depict "apparent sexual stimulation or gratification." See Minn. Stat. § 617.246, subd. 1(e)(5). And although Cota claims that the photographs do not depict a minor in an act of "apparent sexual stimulation or gratification," even he concedes that they are "inappropriate and troubling."

A series of three photographs show victim 1 in the shower. In the first photograph, she is "leaning forward . . . with her mouth open and tongue extended in combination with her [hands in] contact with both of her breasts provide the appearance of pleasure or satisfaction in what she is doing." In the second photograph, victim 1 used soap to make "circular-type patterns around just the circumference of her breasts." In the third photograph, she holds a soap container close to her face and has her tongue out as soap pours on her breasts as she touches the underside of her right breast with her free hand. As the district court stated, "it is reasonably inferred that [she] is utilizing the soap to simulate

male ejaculation.” In the one photograph of victim 2, she is on lying on a bed, exposing her breasts, and touching her breast and nipple for no apparent purpose other than for sexual stimulation or gratification. We conclude that the evidence was sufficient to prove that the images are pornographic works involving minors.

Appellant knew or had reason to know he possessed “pornographic works”

Cota also argues that, even if the photographs are “pornographic works,” the circumstantial evidence is insufficient to show that he knew or had reason to know that the photographs were “pornographic works.” Under section 617.247, subdivision 4, “a possessor of child pornography has ‘reason to know’ that a pornographic work involves a minor whe[n] the possessor is subjectively aware of a ‘substantial and unjustifiable risk’ that the work involves a minor.” *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007).

Knowledge may be proved by circumstantial evidence. *State v. Al-Naseer*, 734 N.W.2d 679, 688 (Minn. 2007). When an element of an offense is proved by circumstantial evidence, this court applies a heightened two-step analysis. *State v. Colgrove*, 996 N.W.2d 145, 150 (Minn. 2023). First, “we identify the circumstances proved.” *Id.* (quotation omitted). This step involves taking the evidence in favor of the verdict and yielding “a subset of facts that constitute the circumstances proved.” *Id.* (quotations omitted). Second, we independently consider the reasonable inferences that can be drawn from the circumstances proved. *Id.* The circumstances proved “must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017).

Here, the circumstances proved regarding Cota's knowledge include: 1) Cota knew that the photographs were in his possession, 2) Cota told law enforcement that the photographs were "gross" and "crap," 3) Cota acknowledged that he should have deleted the photographs, 4) Cota attempted to have his son state that his son put the photographs on Cota's computer, 5) Cota stated that he wanted to show the photographs to the minors' parents, and 6) the minors' mothers testified that Cota never told them about the photographs.

Cota claims that the circumstantial evidence does not disprove the reasonable hypothesis that he believed only that the photographs were "troubling," "inappropriate," and "gross" and wanted to tell the minors' parents about them. But the state was required to show only that Cota knew that there was a "substantial and unjustifiable risk" that the photographs were of a minor. *See Mauer*, 741 N.W.2d at 115. The circumstantial evidence shows that Cota stated that the photographs were "gross," admitted that he should have deleted them, and then attempted to shift blame to his son. This demonstrates Cota's awareness of the substantial and unjustifiable risk. Additionally, the evidence of the mothers of the minors testifying that Cota never told them about the photographs disproves that he merely wanted to tell the minors' parents about the photographs. We conclude that the evidence was sufficient to prove that Cota knew or had reason to know that he possessed images of minors in pornographic works.

Pro se claims

Cota filed a pro se supplemental brief in which he raises a variety of claims. He claims that his trial attorney was not in contact with him, police officers invented an

accusation that certain images were on his phone, his Facebook was hacked, and he had photographs on his computer only to print them to show to the minors' parents, but he ran out of printer ink.

We conclude that Cota's pro se claims are forfeited because he fails to support the claims with legal argument or authority. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002). And "[a]n assignment of error based on mere assertion and not supported by any argument or authorities . . . is [forfeited] and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (quotation omitted). Here, prejudicial error is not obvious because there is no record to review on direct appeal of Cota's claim against trial counsel, and the other claims are allegations or defenses that should have been raised in district court.

Affirmed.