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DISTRICT II

June 12, 2024

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You are hereby notified that the Court has entered the following opinion and order:

2023AP908-CR State of Wisconsin v. Travis L. Tingler (L.C. #2021CF323)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Travis L. Tingler appeals a judgment of conviction, entered following a jury trial, for exposing a child to harmful material as a repeater. Tingler argues the evidence was insufficient to support his conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State charged Tingler with repeated sexual assault of the same child, exposing a child to harmful material, felony bail jumping, possession of THC as a second and subsequent offense, misdemeanor bail jumping, and possession of drug paraphernalia. All of the charges included the repeater enhancer except for the possession-of-THC charge.

As relevant to this appeal, at trial, the jury watched a forensic interview of Taylor.[2] Taylor was born in November 2007. Tingler, who was Taylor's mother's live-in boyfriend, began assaulting Taylor on New Year's Eve 2016, when Taylor was eight years old. The assaults continued until 2019. Taylor's mother and Tingler broke up, and Taylor's mother, Taylor, and Taylor's sister moved away. Taylor described various and repeated sex acts that Tingler performed on him, including penis-to-vagina, penis-to-anus, and penis-to-mouth penetration.

When the forensic interviewer asked if Tingler ever showed Taylor videos or "videos of their bodies," Taylor replied, "He made me watch porn with him a few times." Taylor explained that he and Tingler would sit next to each other on the living room couch, that Tingler had his arm around him, and that if Taylor tried to look away, Tingler "would just … redirect [Taylor's] head at it." When the forensic interviewer asked Taylor what he saw, Taylor responded, "People having sex, naked girls, things like that." Taylor later described "naked girls" as "women, like Mom's age," and "adults." Taylor said Tingler would stop and put his phone away when

[2] We use the pseudonym Taylor to refer to the victim. *See* WIS. STAT. RULE 809.86(4). Taylor is biologically a female. At trial, both Taylor's mother and Taylor testified that Taylor now used a name different from his birth name and male pronouns. We use Taylor's preferred pronouns throughout our opinion out of "respect for [Taylor]'s individual dignity." ***State v. C.G.***, 2022 WI 60, ¶6 n.9, 403 Wis. 2d 229, 976 N.W.2d 318 (plurality opinion as to ¶¶6 and 36-46); *see also* WIS. CONST. art. I, § 9m(2)(a) (affording victims the right "[t]o be treated with dignity, respect, courtesy, sensitivity, and fairness").

Taylor's younger sister came by him. Taylor said this happened three or four times in the living room on 19th Street.[3]

Detective Sergeant Michael Stone testified that Tingler told Stone that he gets pornography through feeds on his phone. Tingler also confirmed that he sat on the couch with Taylor while looking at pornography on his phone. While Tingler never made Taylor look at it, Tingler acknowledged that Taylor may have seen it. While discussing the pornography on his phone, Tingler told Stone that he felt that sex education is taught sooner to kids and expressed his belief that parents should teach more sex education to their children, but he denied educating Taylor about sex.

At trial, Tingler denied having sexual intercourse with Taylor, including by penis-to-vagina, penis-to-anus, or penis-to-mouth intercourse. Tingler admitted to watching pornography on his phone, but he denied grabbing Taylor and making him watch it. Tingler said that Taylor made things up about him because Taylor was mad that Tingler spanked him and because Taylor disrespected Tingler and Taylor's mother. The jury found Tingler guilty as charged on all counts.

On appeal, Tingler argues the evidence was insufficient to support his conviction for exposing Taylor to harmful materials. Whether the evidence was sufficient to sustain a guilty verdict presents a legal question that this court reviews independently. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. When reviewing the sufficiency of the evidence to

[3] Tingler explains that given the timing on when they lived at 19th street, Taylor was ten and eleven years old.

support a conviction, this court will substitute its judgment for that of the jury only if the evidence, when viewed most favorably to the state and the verdict, "'is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***Id.***, ¶22 (citation omitted).

To be guilty of exposing a child to harmful materials, the State is required to prove, in part, that the materials are "harmful to children." *See* WIS. STAT. § 948.11(2)(a), (1)(ar), (1)(b); WIS JI—CRIMINAL 2142 (2019).

> "Harmful to children" means that quality of any description, narrative account or representation, in whatever form, of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture or brutality, when it:
>
> 1. Predominantly appeals to the prurient, shameful or morbid interest of children;
>
> 2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for children; and
>
> 3. Lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole.

WIS. STAT. § 948.11(1)(b); *see also* WIS JI—CRIMINAL 2142. Here, Tingler argues the evidence in this case was not sufficient to support a reasonable inference that the videos Taylor saw were "harmful to children." We disagree.

Viewing the evidence in this case most favorably to the State, we conclude that a "'trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt,'" based on the testimony presented. *See* ***Booker***, 292 Wis. 2d 43, ¶22 (citation omitted). Taylor described the videos that Tingler forced him to watch as "porn," which he said depicted adult naked females and "people having sex." A reasonable jury could find that pornographic videos depicting adult

naked females and "people having sex" fits the definition of "sexually explicit conduct" under the statute, which in turn incudes "sexual intercourse." *See* WIS. STAT. § 948.01(7).[4] We reject Tingler's argument that Taylor, when describing the videos as depicting "people having sex," could have perhaps meant something other than "sexually explicit conduct" or "sexual intercourse." The evidence at trial established that Taylor's understanding of "people having sex" was informed by Taylor's education and his experience of Tingler repeatedly sexually assaulting him for years.

Additionally, the jury could reasonably conclude that pornographic videos depicting adult naked females and "people having sex" predominately appeals to the prurient interest of children. *See* ***Booker***, 292 Wis. 2d 43, ¶25 ("'Prurient' is defined as 'arousing inordinate or unusual sexual desire.'" (citation omitted)). The jury could also make a reasonable determination that these videos are considered by Wisconsin adults to be unsuitable for an eleven-year-old child. *See* ***id.***, ¶26 ("Videos showing explicit sexual acts are commonly rated and restricted so that minor children will not be exposed to them.").

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[4] WISCONSIN STAT. § 948.01(7) defines "Sexually explicit conduct" as "actual or simulated":

> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
>
> (b) Bestiality;
>
> (c) Masturbation;
>
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
>
> (e) Lewd exhibition of intimate parts.

Finally, the jury could reasonably conclude the videos lacked serious literary, artistic, political, scientific, or educational value for an eleven year old. Tingler admitted to police that he watched porn while Taylor was on the couch with him and denied educating Taylor about sex. There was no evidence that the videos Taylor said Tingler forced him to watch had merit for an eleven-year old for any reason. Accordingly, we conclude that the evidence submitted to the jury was such that a reasonable jury could have found beyond a reasonable doubt that Tingler violated WIS. STAT. § 948.11. Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals