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DISTRICT II

May 25, 2022

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

2021AP711-CR State of Wisconsin v. Meiranda A. Patterson (L.C. #2019CF1405)

Before Gundrum, P.J., Neubauer and Kornblum, 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).

Meiranda A. Patterson appeals a judgment of conviction for exposing a child to harmful material. She argues the evidence was insufficient to support her 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 (2019-20).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Patterson, a special education teacher, was convicted by a jury of showing a student a seemingly nude photograph of a man with whom she planned to go on a date. When a defendant challenges the sufficiency of the evidence, we will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990), *holding reaffirmed by* ***State v. Smith***, 2012 WI 91, 342 Wis. 2d 710, 817 N.W.2d 410. Therefore, we will uphold the conviction if, in our de novo review, we determine there is any reasonable hypothesis that supports it. ***Smith***, 342 Wis. 2d 710, ¶24.

Patterson's brief acknowledges that the photograph she displayed to the fourteen-year-old minor in this case "depicted a very small portion of the portrayed persons' phallus," as well as his torso. Patterson—noting the picture did not feature full-frontal nudity—argues the photograph did not constitute "harmful material" within the meaning of WIS. STAT. § 948.11(1)(ar). She also argues the photograph did not depict "nudity" as defined by § 948.11(1)(d). We reject both arguments.

To convict Patterson, the State was required to show that she, "with knowledge of the character and content of the material," exhibited to a child "harmful material." WIS. STAT. § 948.11(2)(a). "Harmful material," in turn, is defined as any "photograph … or image of a person or portion of the human body that depicts nudity … and that is harmful to children." Sec. 948.11(1)(ar)1. "Harmful to children," as relevant here, refers to the nature of the representation of nudity, to the extent that it "[p]redominantly appeals to the prurient, shameful or morbid interest of children" and "[i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for children." Sec. 948.11(1)(b)1.-2.

WISCONSIN STAT. § 948.11(2) is a variable obscenity statute because it criminalizes a person from exhibiting materials deemed obscene to minors but not obscene to adults. ***State v. Stuckey***, 2013 WI App 98, ¶11, 349 Wis. 2d 654, 837 N.W.2d 160. "The first two prongs of the test—appeal to prurient interest and patent offensiveness—are analyzed by applying contemporary community standards." ***State v. Thiel***, 183 Wis. 2d 505, 535, 515 N.W.2d 847 (1994).

Insofar as "contemporary community standards" are concerned, Patterson relies on Chief Justice Abrahamson's dissent in ***State v. Trochinski***, 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891, particularly her observation that "[n]udity seems to be the least offensive type of visual representation listed in the statute." ***Id.***, ¶54 (Abrahamson, C.J., dissenting).[2] Chief Justice Abrahamson would have allowed plea withdrawal in ***Trochinski*** based upon her conclusion that there was an insufficient factual basis for the defendant's plea, ***id.***, ¶¶62-63 (Abrahamson, C.J., dissenting), even though the probable cause section of the complaint alleged that the defendant had given a seventeen-year-old girl ten nude photographs of himself with his penis exposed, ***id.***, ¶5. Whatever the merits of Chief Justice Abrahamson's legal analysis—which appeared to turn on the circuit court's failure to consider a variety of factors relating to the offense, including the victim's age—her opinion failed to garner a majority vote and is not binding on this court. Regardless, even if nudity is the "least offensive" type of material prohibited by WIS. STAT. § 948.11(2), it is, nonetheless, prohibited.

[2] We note this argument appears wholly inconsistent with the notion that the photograph Patterson exhibited did not depict nudity, an argument we address later in this opinion.

The heart of Patterson's argument on the "harmful to children" element, though, appears to be that there was insufficient evidence to support the jury's determination that the photograph was patently offensive for a fourteen-year-old child. Patterson first asserts that there was "[no] evidence presented at trial on the issue of like-minded children of the same age"—the implication apparently being that the State was required to present some affirmative evidence of whether the photograph in the instant case would be regarded by the objective fourteen-year-old as patently offensive.[3] This argument mischaracterizes the statute, which focuses on whether the material is "patently offensive *to prevailing standards in the adult community as a whole* with respect to what is suitable for children." WIS. STAT. § 948.11(1)(b)2. (emphasis added). The relevant group under the statute to decide what is suitable for children is the adult community, not the children themselves.

"The United States Supreme Court, federal courts, and Wisconsin courts are uniform in concluding that questions of whether material appeals to prurient interests, satisfies community standards for potentially obscene material or has literary, artistic, political, scientific or educational value may be appropriately decided by a jury." ***State v. Booker***, 2006 WI 79, ¶24, 292 Wis. 2d 43, 717 N.W.2d 676. Moreover, in making these determinations, jurors may rely on their common sense and life experiences. *See* ***State v. Heitkemper***, 196 Wis. 2d 218, 225, 538 N.W.2d 561 (Ct. App. 1995). We do not perceive the type of specific testimony Patterson proposes to have been necessary to a determination of guilt.

[3] We agree with the State that even if such testimony were necessary, the victim's testimony that she was "disgusted" by the photograph, as well as testimony that Patterson told another student to turn away before she showed the victim the photograph, constituted sufficient evidence from which the jury could conclude that the photograph was harmful to children.

Patterson also notes she presented contrary evidence of community standards, namely several exhibits that depicted what she regards as "more salacious" pictures distributed in media, including images of Khloe Kardashian and David Beckham. This argument ignores our standard of review. The weight to be given the evidence is a determination for the trier of fact. ***Poellinger***, 153 Wis. 2d at 504. Our only task is to determine whether the evidence was sufficient to sustain the conviction. *See* ***id.*** at 507. The jury was within its rights to reject Patterson's evidence of contemporary community standards. Moreover, the jury could reasonably conclude that a photograph depicting a portion of a male's exposed penis both appealed to the prurient interest of children and was patently offensive to prevailing standards about what is appropriate for children.

Finally, Patterson argues the photograph does not constitute "nudity," which is defined by WIS. STAT. § 948.11(1)(d). That definition, as relevant here, is "the showing of the male … genitals [or] pubic area … with less than a full opaque covering." ***Id.*** Patterson's assertion that the "male genitals are missing from the photograph" is belied by the record—and by her own brief's statement that the photograph "depicted a very small portion of the portrayed persons' phallus."[4] Moreover, as the State points out, Patterson's argument fails to account for the fact that the photograph included a depiction of the man's pubic area.[5]

[4] The State estimates that approximately one inch of the upper shaft of the man's penis was depicted in the image.

[5] In her reply brief, Patterson argues it is "questionable whether … the 'pubic area' of the male subject in question is actually, and clearly depicted in the photo." We do not regard it as questionable. The photograph clearly depicts the subject's pubic area—the area directly above the genitals. To the extent Patterson attempts to raise an issue regarding the enlargement of the photograph in the record, whether the male's penis and pubic area would have been visible on a cell phone was a matter within the province of the jury.

In her reply brief, Patterson relies on a medical dictionary's use of the conjunction "and" when defining "external genitalia" as "the penis *and* scrotum of a male." (Emphasis added.) Patterson therefore argues that the photograph does not constitute "nudity" because it does not depict the male's scrotum. It would be absurd to interpret WIS. STAT. § 948.11(1)(d) in the manner Patterson suggests, particularly given her tenuous reliance on a conjunctive term not found in the text of the statute. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (noting statutes are interpreted to avoid absurd or unreasonable results). There is absolutely no indication in the statutory language that the legislature intended to criminalize displays of only full male genitals to minors.

Patterson also focuses on her purpose for showing the student the photograph, emphasizing that her "primary intent" was "merely to show the [student] a photograph that a man had sent" to her cell phone. Patterson fails to explain how her intent is relevant to any issue on appeal. Under WIS. STAT. § 948.11(2), knowledge of two things is required: (1) the "character and content of the material," and (2) the fact that the person the material is being exhibited to is under the age of eighteen. Neither of those knowledge criteria address the defendant's purpose for exhibiting the material.

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.

Sheila T. Reiff
Clerk of Court of Appeals