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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-23-125

ANNA JOY KIDD APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 6, 2023 APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. 73CR-21-607] HONORABLE MARK PATE, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

This is an appeal from Anna Joy Kidd's conviction of one count of sexual indecency with a child, a Class D felony, for exposing her sex organs in the course of sexual conduct that did not fit the elements of sexual assault. Ark. Code Ann. § 5-14-110(a)(2)(A) & (b) (Supp. 2023). She argues the exposure offense in the sexual-indecency statute was unconstitutionally applied to her for the same reasons we reversed a solicitation conviction under section 110(a)(1)(A) in *Worsham v. State*, 2019 Ark. App. 65, 572 S.W.3d 1. We affirm.

I.

Kidd and M.C. met at a private high school with ten to fifteen students. She was a senior. He was in ninth grade. Kidd was about three years, nine months older. They exchanged DMs (direct messages) on Snapchat, Instagram, and Pinterest. The conversations went where one might guess. During Spring Break in March 2021, the two had sexual

intercourse at least seven times, mostly in Kidd's parked car. She was then eighteen; he was fourteen. M.C.'s parents found out. The prosecution that followed revealed that virtually everyone involved had made some mistaken assumptions about what sexual conduct between Kidd and M.C. was or was not prohibited by Arkansas law.

Kidd had assumed that, because of her and M.C.'s ages, sexual intercourse with M.C. was a crime. She told him in one message that if she became pregnant with his baby, she would have to give birth in jail. M.C.'s parents also believed sexual intercourse between Kidd and M.C. was illegal, and testified so at the bench trial.

In truth, it was *not* a crime for Kidd to "engage in sexual intercourse" with M.C.—at least it was not a sexual assault, the crime she probably had in mind (and which the State might rather have charged). It would have been second-degree sexual assault for Kidd, who was "eighteen years of age or older" to engage in "sexual contact with another person who is [l]ess than fourteen (14) years of age." Ark. Code Ann. § 5-14-125(a)(3)(A) (Supp. 2023). But M.C. was fourteen. It would have been fourth-degree sexual assault if, at "twenty (20) years of age or older" she had "[e]ngage[d] in sexual intercourse or deviate sexual activity" or "sexual contact" with a person under sixteen. Ark. Code Ann. § 5-14-127(a)(1)(A) & (B) (Supp. 2023). But Kidd was younger than twenty. So Kidd's sexual contact and sexual intercourse with M.C. was not sexual assault by statutory definitions. Some prosecutors might have stopped there. This one didn't.

The State's first attempted workaround was to charge Kidd with the solicitation offense in section 110(a)(1)(A) of the sexual-indecency statute. The statutory elements would encompass a person Kidd's age who "solicit[ed] another person who is less than *fifteen*

(15) years of age"—as M.C. was—"to engage in sexual intercourse." Ark. Code Ann. § 5-14-110(a)(1)(A) (Supp. 2023) (emphasis added).

But we had held in *Worsham* that section 110(a)(1)(A) was unconstitutional as applied to solicitations sent by an eighteen-year-old (✓Kidd) to his fourteen-year-old (✓M.C.) girlfriend. Engaging in (instead of requesting) sexual intercourse with her would have been lawful for Worsham.[1] So the solicitation offense in section 110(a)(1)(A), which directly regulates speech, was subject to strict scrutiny under the First Amendment to the United States Constitution and article 2, section 6 of the Arkansas Constitution. *Id.* at 3–4, 572 S.W.3d at 3. We held it was not narrowly tailored to protect the State's stated interest in protecting children from communications from older teens and adults soliciting sex. *Id.* at 7, 572 S.W.3d at 5. If the State wanted to do that, it was required to prohibit the sexual conduct itself, not speech soliciting conduct that remained lawful. *Id.* at 7–8, 572 S.W.3d at 5–6.

The solicitation charges against Kidd promised a rerun of *Worsham*, and she moved to dismiss them on many of the same grounds. But Kidd had done much more than speak to M.C.: He would testify at her bench trial that he could see Kidd's vagina when he was performing oral sex on her and having vaginal intercourse with her.[2] He confirmed that she had wanted him to see "it" and had enjoyed doing so.

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[1]Or at least not a sexual assault. *Worsham*, 2019 Ark. App. 65, at 2 n.1, 572 S.W.3d at 2 n.1.

[2]M.C. also testified that Kidd had exposed her vagina while masturbating over Facetime. The circuit court did not specify whether Kidd was guilty for exposing herself in person or through Facetime. The parties assume she was convicted for an in-person exposure.

The State saw another workaround. The elements of the exposure offense in section 110(a)(2)(A) of the sexual-indecency statute could also encompass an eighteen-year-old's conduct with a fourteen-year-old:

> A person commits sexual indecency with a child if [w]ith the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of another person, the person purposely exposes his or her sex organs to another person who is less than fifteen (15) years of age.

Ark. Code Ann. § 5-14-110(a) & (a)(2)(A). The State filed an amended information charging Kidd with six counts under that provision, which it argued focused on conduct, not speech.

The evidence at trial is sufficiently described for now. Kidd moved to dismiss the exposure charges in the amended information, renewing the motions at the necessary points. She cited *Worsham* and argued for dismissal on First Amendment grounds, characterizing her exposures as acts of sexual expression. She argued that section 110(a)(2)(A), like section 110(a)(1)(A), was overbroad as applied to conduct she characterized as lawful because the physical aspects were not defined as sexual assault. If the General Assembly wanted to prohibit that conduct, she argued, it should amend the age ranges in the sexual-assault statutes, not bootstrap the prohibition into a regulation of what she called "a natural consequence of lawful sexual relations."

The State argued that *Worsham* is distinguishable because the exposure offense in section 110(a)(2)(A) regulates conduct, not speech. If Kidd's conduct fit the elements of the offense, the State could charge it.

The circuit court generally denied Kidd's motions as renewed at the close of proof. It found Kidd guilty of one count of sexual indecency with a child under section

110(a)(2)(A), committed between November 2020 and April 2021. It acquitted her of the other counts, sentenced her to two years' probation, imposed a $1,000 fine and statutory fees, and ordered her to register as a sex offender.

II.

Kidd renews her constitutional arguments on appeal. Virtually all of them track the arguments or analysis in *Worsham*, and therefore depend on a conclusion that the exposure offense in section 110 regulates speech, so the same overbreadth analysis will apply. We conclude that the exposure offense regulates conduct, not speech. Further, Kidd has presented no other meritorious grounds for narrowing its statutory scope.

First, the exposure offense in section 110(a)(2)(A), which the State characterizes as a prohibition on "the act of exposing sex organs to a child in person, in the flesh" does not present the free-speech concerns that controlled in *Worsham*. Although the First Amendment's protections are not limited to the written or spoken word, the United States Supreme Court has rejected the view that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea[.]" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Rather, conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[.]" *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) ("[A] general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all[.]").

As the State notes, the exposure provision in section 110(a)(2)(A) was originally codified in the indecent-exposure statute. *See* Act 817 of 1997, § 1; Act 1821 of 2001. We have interpreted the term "expose" in section 110 to mean "laying open to view." *Malvin v. State*, 2014 Ark. App. 584, at 4, 446 S.W.3d 208, 210. In *Krol v. State*, we affirmed a conviction where a Walmart employee noticed in surveillance footage that the defendant had walked up behind three children and exposed his penis as he stood behind them. 2018 Ark. App. 512, at 1–2, 563 S.W.3d 586, 587. No one had reported the incident; the children were never identified. *Id.* at 2–3, 563 S.W.3d at 587–88. It was not clear they saw anything. We held that section 110(a)(2)(A) did not require proof that they had "because the plain language of the statute does not contain any explicit requirement that the child observe the act." *Id.* at 7, 563 S.W.3d at 590.

We infer that the defendant in *Krol* acted to "arouse or gratify a sexual desire" peculiar to the transgressive act of exposing his sex organs near children, even if they were not aware he had done so. That wholly self-gratifying conduct might be closer to the typical application of section 110(a)(2)(A) than Kidd's conduct here. But our affirmance in *Krol* demonstrates that section 110(a)(2)(A) restricts nonexpressive conduct: it applies even if no one but the defendant knows, or is intended to know, about the exposure. "Being 'in a state of nudity' is not an inherently expressive condition." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion).

Kidd's own exposures of sex organs, as M.C. described them at trial, were what might be called functional nudity, not expressive nudity. After the State elicited that M.C.

could see Kidd's vagina the first two times they engaged in sexual conduct, he testified they had vaginal intercourse on another occasion. This examination followed:

PROSECUTING ATTORNEY:	Could you see it?
MINOR CHILD:	Yes.
PROSECUTING ATTORNEY:	Did she want you to see it?
MINOR CHILD:	Yes.
PROSECUTING ATTORNEY:	Did she enjoy it?
MINOR CHILD:	Yes.

After a foundation objection, the State resumed:

PROSECUTING ATTORNEY:	So, how could you tell that she wanted you to look at it?
MINOR CHILD:	She wanted it.
PROSECUTING ATTORNEY:	And when you say, "She wanted it," what do you mean?
MINOR CHILD:	She wanted to have sex with me.

The State moved on.

In *Worsham*, the absence of a prohibition on sexual intercourse set up a constitutional right, not a statutory right: If doing *X* with a person is lawful, a restriction on speech soliciting the person to do *X* has to pass strict scrutiny. 2019 Ark. App. 65, at 3–4, 572 S.W.3d at 3. We reviewed for overbreadth because the defendant had a constitutional right to speak to his girlfriend, not a right—of any kind—to have sex with her.

Kidd argues that *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), and *Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429, which were not free-speech cases, nonetheless

require giving section 110(a)(2)(A) a narrowing construction to accommodate lawful sexual contact. But like *Worsham*, *Jegley* and *Paschal* involved conflicts between a statutory prohibition and a constitutional right—specifically, statutes that restricted consensual sex between adults, which infringed on a fundamental right to privacy. *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350; *Paschal*, 2012 Ark. 127, at 11–12, 388 S.W.3d at 436. The distinction is that M.C. was not an adult. Kidd conceded below that restrictions on sexual conduct with minors do not implicate a fundamental right. And she does not argue on appeal that the State did not prove her guilt under section 110(a)(2)(A) if the exposure offense applies as it reads.

In that posture, we're left with three statutes. Section 110(a)(2)(A) makes it a Class D felony for Kidd to expose her sex organs to M.C. The other statutes do not separately prohibit the sexual intercourse that followed. Ark. Code Ann. §§ 5-14-125(a)(3)(A)–(B) & (b)(1); 5-14-127(a)(1)(A) & (B). The statutes establish different offenses for acts that might—but might not—occur close in time between the same people. We are not persuaded the General Assembly meant to license everyone whose sexual contact is not sexual assault to engage in related conduct that is expressly prohibited by other statutes. Nor are we persuaded by Kidd's contention that her conviction under section 110(a)(2)(A) infringed upon her constitutional rights.

There might be merit in Kidd's argument that the exposure offense in section 110(a)(2)(A) creates a complicated, even surprising, interaction with statutes that might be mistakenly understood to establish a single "age of consent." But the State did not "create offenses" by construction or intendment by employing section 110(a)(2)(A) here. *Paschal*,

2012 Ark. 127, at 11, 388 S.W.3d at 436. The General Assembly created the offense by enacting its terms.

Affirmed.

GRUBER and HIXSON, JJ., agree.

Monty V. Baugh, PLC, by: *Monty Vaughan Baugh*, for appellant.

Tim Griffin, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.