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ARKANSAS COURT OF APPEALS

DIVISIONS I & IV
No. CR-23-604

KEVIN SKILLERN APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered June 5, 2024 APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. 43CR-21-614] HONORABLE BARBARA ELMORE, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Kevin Skillern appeals his conviction by the Lonoke County Circuit Court of sexual indecency with a child. On appeal, he argues that the circuit court erred in denying his motion to dismiss because the State did not present sufficient evidence that he purposely exposed his sex organs to a minor under fifteen years old. We affirm.

I. *Relevant Facts*

Skillern was charged by amended felony information with sexual indecency with a child, a Class D felony, in violation of Arkansas Code Annotated section 5-14-110(a)(2)(A) (Supp. 2023). A bench trial was held on April 18, 2023, and the following relevant testimony and evidence was adduced. On July 18, 2021, three friends, Allie Hooper, Jadan Morris, and Makiyyah Coleman, were riding in a side-by-side with one-year-old MV, trying to lull the child to sleep. The three women and the baby drove in a loop around Allie's property and

past her grandmother's property and Skillern's property, which were all in the same area. After a couple of loops, Allie saw Skillern standing in the doorway of his workshop; his pants were around his ankles and he was masturbating. Allie testified that he was "staring right at us" as they drove past him, and he had done this before. Allie asked her two friends on the side-by-side to confirm what she saw, and she drove the loop again two more times. Each of the three young women saw Skillern in the above-described state, although there was testimony that MV was likely asleep at some points during the drive. The three women told Jason Hooper, Skillern's brother-in-law, who confronted Skillern. Jason stated that Skillern had been exposing himself in this manner since 2013 and that Skillern told him he could do what he wanted on his property. Ariel Hooper, who was not on the side-by-side that day, testified that Skillern had done this exact thing to her "too many times to count," and it began when she was around twelve years old. In Sergeant Scott McCullough's report, only the three women were listed as victims, and there was no mention of MV.

Skillern moved to dismiss, arguing that there was no proof that Skillern intended to expose himself to the one-year-old, who was likely asleep when this happened, and there was no evidence that Skillern's arousal was connected in any way to the one-year-old or "that that's who [Skillern] is directing his sexual gratification to." The State responded that Skillern has a history of exposing himself to children under the age of fifteen, there was testimony that MV was a passenger on the side-by-side, and Skillern was looking directly at the people on the side-by-side while he masturbated.

The circuit court denied the motion, stating,

> I'm going to find him guilty. And then the legislator – the state – the appeals court can do whatever they wish to with it, but under the plain language of the law . . . it doesn't allow you to expand the meaning of the statute. It's just very frank as to what it is. So I'm going to say he's guilty based on the – the statute and the case law.

Despite the premature pronouncement of guilt from the court, the trial resumed, and Skillern was allowed to call his witnesses. Family members then testified that Skillern was at his father's house at the time of the incident.

At the close of the evidence, Skillern renewed his motion to dismiss, restating his basis from his first motion, and adding that

> he has to know that it's a one-year-old and he has to be sexually gratifying himself to that one-year- old, to that child. And that's where I believe the State's case fails even at – at directed verdict stage.
>
> If there was proof that the child was alone, if there was proof that he knew the child was on there, if there was proof that there weren't 18-year-olds riding around on it, then – then maybe so, but I – I do not believe that he's – there's been sufficient evidence to show that he was actually exposing himself to a one-year-old to gratify himself.

The circuit court denied the motion and found Skillern guilty of sexual indecency with a child, sentencing him to seventy-two months' probation. This appeal followed.

II. *Discussion*

On appeal, Skillern contends that the State failed to establish that he intended to expose himself to a child under the age of fifteen because the State did not offer any proof of where on the vehicle MV was sitting or that she was visible to him; thus, because there was no evidence that he knew MV was a passenger in the side-by-side, the State did not prove that he intended to expose himself to MV. We disagree.

A motion to dismiss is treated as a challenge to the sufficiency of the evidence. Bolen v. State, 2023 Ark. App. 373, at 20, 675 S.W.3d 145, 156. On review, this court views the evidence in the light most favorable to the State and considers only the evidence that supports the verdict. *Id.* We will affirm a conviction if there is substantial evidence to support it, and evidence—either direct or circumstantial—is substantial if it compels a conclusion and passes beyond mere speculation or conjecture. *Milton v. State*, 2023 Ark. App. 382, 675 S.W.3d 173. This determination, along with the credibility of witnesses and the weight of the evidence presented at trial, is left to the fact-finder. Id. at 6, 675 S.W.3d at 177. It is the function of the circuit court, and not the reviewing court, to evaluate and to resolve any inconsistencies in the evidence. *Bolen*, *supra*.

A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result. *See* Ark. Code Ann. § 5-2-202(1) (Repl. 2013). A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *See Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553.

Arkansas Code Annotated section 5-14-110(a)(2)(A) provides that a person commits sexual indecency with a child if, "with the purpose to arouse or gratify a sexual desire[,] . . . the person purposely exposes his . . . sex organs to another person who is less than fifteen (15) years of age." A person acts purposely when it is the person's conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2013). Sexual gratification is not defined by the statutory code, but the two words have been

interpreted according to their plain meaning. *Gilton v. State*, 2018 Ark. App. 486, 562 S.W.3d 257.

The uncontroverted testimony was that MV was a passenger in the side-by-side. Arkansas Code Annotated section 5-14-110(a)(2)(A) requires only that Skillern purposely expose his sex organs to another person who is less than fifteen years of age. The statute does *not* require that the person who exposes himself must know the age of the person he is exposing himself to. "We have repeatedly rejected reading additional requirements into a statute that were not placed there by the legislature." *Krol v. State*, 2018 Ark. App. 512, at 7, 563 S.W.3d 586, 590; *Heape v. State*, 87 Ark. App. 370, 374–77, 192 S.W.3d 281, 284–86 (2004).

Pursuant to the plain language of the statute, the relevant inquiry here is whether there is sufficient evidence that Skillern purposely exposed his sex organs to another person and whether that person was under fifteen years of age. The answer to both questions is yes. The baby was a passenger in the side-by-side, and Skillern was staring at the passengers while he masturbated. Skillern did not cover himself or cease his behavior as the women and baby made the loop several times. Allie specifically testified that he was "staring right at *us*." Therefore, the court did not resort to speculation to find Skillern guilty of sexual indecency with a child. Given the standard of review, we affirm.

Affirmed.

ABRAMSON, GLADWIN, GRUBER, and WOOD, JJ., agree.

HIXSON, J., dissents.

KENNETH S. HIXSON, Judge, dissenting. Perhaps, I should start this dissent by explaining the anatomy of a "test case." It starts on the morning of trial when the prosecutor amends her Information:

> [THE PROSECUTOR]: And, Your Honor, prior to beginning, the State would move to amend the charges to Sexual Indecency with a Child under 5-14-110[.]
>
> THE COURT: To what? To what?
>
> [THE PROSECUTOR]: From Indecent Exposure, fourth or fifth conviction within ten years, a class D felony, to Sexual Indecency with a Child under 5-14-110(2)(a).

The trial commenced, and the evidence was introduced generally as described in the majority opinion. At the close of the State's case-in-chief, and before calling the defendant's (appellant's) witnesses, appellant's attorney made the appropriate motion to dismiss, arguing, inter alia, that the State failed to prove that the defendant "purposely" exposed his sex organs to another person who is less than fifteen years of age as required under Ark. Code Ann. § 5-14-110(a)(2)(A) (Supp. 2023). The argument was short. The court denied the motion:

> THE COURT: . . . I'm going to find him guilty. And then the legislator – the state – the appeals court can do whatever they wish to with it, but under the plain language of the law . . . it doesn't allow you to expand the meaning of the statute. It's just very frank as to what it is. So I'm going to say he's guilty based on the – the statute and the case law.
>
> [DEFENSE ATTORNEY]: Your Honor, we've got some witnesses to call if we could.
>
> THE COURT: Okay. Oh, well, I can't find him guilty then yet. All right. All right. Who would you like to call?

The foregoing colloquies set the tone for the test case at bar. At the conclusion of all the testimony, appellant's attorney appropriately repeated his motion to dismiss. Without unnecessarily repeating the contents of the motion herein, the circuit court found the following: "Now if they [the legislature] want to go back and rework the law or whatever, but as – towards the law as it's written, I do find that he's guilty."

There can be no doubt that the defendant's conduct was uncouth, crude, indecent, distasteful, uncivilized, _____ (fill in the blank) . . . even criminal. It cannot be said with a straight face that appellant does not deserve some kind of punishment as prescribed by the Arkansas Criminal Code.

Having said that, the statute in play here is a two-part statute. Both parts of the statute require the State to prove *purposeful* conduct. "A person acts *purposely* with respect to his or her conduct or a result of his or her conduct when it is the person's *conscious object* to engage in conduct of that nature or to cause the result." Ark. Code Ann. § 5-2-202(1) (Repl. 2013) (emphasis added).

In this instance, the State had the burden of proving (1) that it was the defendant's purpose to arouse or gratify a sexual desire (which we all agree was met), and (2) the defendant purposely, or *had the conscious object*, to expose his sex organs to a one-year-old sleeping baby that happened to be driving by in a four-wheeler. It appears that the convicting evidence was that while the four-wheeler was driving past (four or five times), appellant looked at it.

Let's return to the motion to dismiss. The State argued, "[T]hey testified that he was in an open doorway. He was looking directly at them." The circuit court denied the motion and found the following:

> The fact of the matter is the one person testified that the child was asleep and that was the person that was caring for the child. I think this is stretching this statute beyond what it can possibly do. There may have been other charges that should've been done, but I don't think that the legislators – I mean, if the child was asleep – I don't know he would've known the child was asleep for one thing.
>
> . . . .
>
> I'm going to find him guilty. And then the legislature – the state – the appeals court can do whatever they wish to do with it[.]

And, here we are. We have accepted the court's invitation. The five-judge majority believes the circuit court was correct. I do not. Even with repugnant conduct, a defendant is entitled to due process of the law and not to be treated as a guinea pig for the legislature or the courts.

On appeal, the defendant, now appellant, argues as he did below that the State failed to prove that he "had the requisite intent." He explains that the State was required to show that he had "the purpose of exposing himself to a child." He explains that "[t]here was no evidence that appellant knew there was a child on the sport utility vehicle, that the child was easily visible on the vehicle, that appellant had reason to believe there was or would be a child on the vehicle, or that it was his intent to expose himself on his private property to sexually gratify himself to a child." I agree.

A person commits sexual indecency with a child if, with 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 years of age. Ark. Code Ann. § 5-14-110(a)(2)(A). It must be noted that the requisite intent required for conviction is not "strict liability." The defendant's engaging in the proscribed conduct is not per se a violation of the statute. Exposure does not equal conviction. The required mental state is not "recklessly." It is not sufficient for conviction that the defendant disregarded a substantial and unjustifiable risk that constituted a gross deviation from the standard of care of a reasonable person. Ark. Code Ann. § 5-2-202(3). The required mental state is not "negligently." It is not sufficient for conviction if the defendant should have been aware of a substantial and unjustifiable risk that the attendant circumstances exist. Ark. Code Ann. § 5-2-202(4). No. The required mental state is "purposely." A person acts "purposely" with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1).

The State argues that this case is analogous to our decision in *Krol v. State*, 2018 Ark. App. 512, 563 S.W.3d 586. I disagree. In *Krol*, evidence was presented at trial that Krol could be seen on a store's surveillance camera sneaking up behind young children and exposing his penis while standing behind the children. Purposeful? No doubt. That is not the case here.

The majority also argues that the evidence was sufficient because appellant "did not cover himself or cease his behavior as the women and baby made the loop several times." Apparently, the majority is relying on our recent opinion in *Milton v. State*, 2023 Ark. App.

382, 675 S.W.3d 173; however, this case is also distinguishable. In *Milton*, the defendant was in his bedroom with his sex organ exposed when a minor child walked in, and Milton made no effort to cover up his sex organ. Purposeful? No doubt. That is not the case here.

Here, most of the evidence was not disputed. Appellant was standing in the doorway of either his residence or shop building exposing himself. Three adult teenagers and a one-year-old sleeping baby drove by four or five times. I suppose the three adult teenagers wanted to confirm what they saw. Appellant looked at the four-wheeler each time it passed by. The four-wheeler did not stop. The four-wheeler did not slow down. This is not *Krol*. This is not *Milton*.

If appellant violated the statute, then what about the person whose house is adjacent to I-630 and who exposes himself while fifty vehicles drive by at seventy miles an hour with minors in the vehicles and while the homeowner looks at the vehicles? Is the person guilty of violating the statute? How many offenses can he or she be charged with? Fifty? One hundred? I suppose the State could get an expert witness to opine how many minors under the age of fifteen travel I-630 within a certain period of time. What about Jeffrey Toobin? He was on a Zoom conference call and exposed himself? What if someone on a Zoom call has a minor child in the background or a baby sleeping in a stroller? Guilty? In these hypothetical scenarios—and in the case at bar—were any of these persons exposing themselves with the conscious object to expose his or her sex organs to a child under fifteen?

While I wholeheartedly admit appellant could certainly be guilty of a variety of charges and do not condone appellant's behavior, I simply cannot conclude that the State presented

sufficient evidence to show that he *purposely* violated this statute, and I would conclude that the State's test case failed. Accordingly, I would reverse and dismiss.

Robert M. "Robby" Golden, for appellant.

Tim Griffin, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.