STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1525

State of Minnesota,
Respondent,

vs.

Kenneth Ray Spears,
Appellant.

Filed July 20, 2010
Affirmed
Stauber, Judge

Sherburne County District Court
File No. 71CR081114

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from his conviction of gross-misdemeanor fifth-degree criminal sexual conduct, appellant argues that his conviction must be reversed because his conduct of

briefly touching the complainant's breasts is not conduct that the legislature intended to criminalize under Minn. Stat. § 609.3451, subd. 1(1) (2006). Because appellant's conduct constitutes fifth-degree criminal sexual conduct as a matter of law, we affirm.

FACTS

The facts are undisputed. Appellant Kenneth Spears lived in an apartment complex in St. Cloud. P.E. routinely visited A., who lived with her boyfriend, G.S., in the same apartment complex. P.E. met appellant through a mutual friend of G.S.'s. B.K. also lived in the same apartment complex. When they met, P.E. informed appellant that she had a fiancé.

On March 13, 2008, about a week after P.E. met appellant, P.E. went to the apartment complex to visit A. P.E. was outside smoking a cigarette when appellant came up the stairs and greeted her by saying "hi" and giving her a hug. P.E. then asked appellant if she had seen G.S. because G.S. was going to give her a ride home. Appellant told her that G.S. and B.K. were in his apartment.

As P.E. and appellant walked to appellant's apartment, appellant told P.E. that he thought she was "hot." He also tried to put his arm around her. P.E. tried to shrug his arm off and told appellant that she had a fiancé and was "taken."

When they reached appellant's apartment, P.E. noticed that G.S. and B.K. were not there. Appellant stated that he meant that G.S. and B.K. were across the hall in B.K.'s apartment. P.E. then asked if there was somewhere that she could extinguish her cigarette. Appellant pointed her in the direction of the sliding-glass doors, which led out to a deck.

As P.E. walked to the deck, she very briefly admired and sat down on appellant's furniture. She then walked out onto the deck and bent over to extinguish her cigarette. When P.E. stood up, appellant, who was right behind her, "put his arms over" her and grabbed her breasts over her clothing. P.E. immediately threw her arms up and exclaimed, "Hey, what are you doing," and "I have a fiancé!" Appellant apologized and asked if they could still be friends. P.E. replied, "Yeah, whatever," and the two left the apartment and found G.S., who gave P.E. a ride home.

Two days after the incident, a police officer contacted P.E. because her name came up as a possible witness in another matter. P.E. then reported the March 13, 2008 incident to the officer, who then contacted appellant. Appellant admitted to the officer that he touched P.E.'s breasts but stated that when P.E. said stop, he backed away from her.

Appellant was charged with fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1(1) (2006). Following a bench trial, the district court found appellant guilty of the charged offense and stayed imposition of the sentence for two years with four days of probational jail time. This appeal followed.

D E C I S I O N

Appellant argues that his conduct, as a matter of law, did not constitute fifth-degree criminal sexual conduct under Minn. Stat. § 609.3451, subd. 1(1). The application of a statute to undisputed facts presents a question of law which this court reviews de novo. *State v. Johnson*, 743 N.W.2d 622, 625 (Minn. App. 2008).

The goal of all statutory construction is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2006). When interpreting a statute, courts initially determine whether the statute is ambiguous. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). "A statute is ambiguous if the language is susceptible to more than one reasonable interpretation." *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). Courts may not disregard the letter of the law in pursuit of the spirit when the words of a statute are "clear and free from all ambiguity." Minn. Stat. § 645.16.

Minnesota law provides that a person who engages in "sexual contact" with another but without the other's consent commits the crime of criminal sexual conduct in the fifth degree. Minn. Stat. § 609.3451, subd. 1(1). "Sexual contact" includes the intentional "touching of the clothing covering the immediate area of the intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i), (iv) (Supp. 2007). "Intimate parts" include the breasts. Minn. Stat. § 609.341, subd. 5 (2006). The contact must not only be nonconsensual, but must also be done with "sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a) (Supp. 2007).

Appellant argues that Minn. Stat. § 609.3451, subd. 1(1) is ambiguous because the legislature did not intend to criminalize the type of conduct in which appellant engaged. To support his claim, appellant cites a number of unpublished cases in which the charges of fifth-degree criminal sexual conduct followed more serious acts than the facts alleged here. Appellant argues that unlike these unpublished cases, the conduct here was far less serious because it was brief, he stopped when P.E. complained of his behavior, and there was no physical injury. Instead, appellant argues that this case is more like *Ohrtman*, in

which this court concluded that there was no criminal sexual conduct where a minister hugged a parishioner while having an erection, and the hug "compressed [the parishioner's] breasts." *State v. Ohrtman*, 466 N.W.2d 1, 2 (Minn. App. 1991). Thus, appellant argues that his conviction of fifth-degree criminal sexual conduct should be reversed.

We disagree. First, *Ohrtman* is distinguishable from the present case because the contact at issue in *Ohrtman* consisted of a hug, which the court did not consider to be sexual contact. *Id.* at 5. In contrast, appellant reached over and grabbed the complainant's breasts, which constitutes "sexual contact" under the applicable statute. *See* Minn. Stat. § 609.341, subds. 5, 11(a)(i), (iv). Second, the unpublished cases on which appellant relies have no precedential value. *See* Minn. Stat. § 480A.08, subd. 3(c) (2006) (stating that "[u]npublished opinions of the court of appeals are not precedential"). And, more importantly, appellant's argument relies on an erroneous interpretation of Minn. Stat. § 609.3451, subd. 1(1). There is nothing in the plain language of the statute that requires physical injury or that the alleged conduct continue despite requests to desist. *See* Minn. Stat. § 609.3451, subd. 1. Rather, the plain language of the statute simply requires that the actor engage in "sexual contact" with the complainant and that the "sexual contact" is "nonconsensual" and done with "sexual or aggressive intent." *Id.*; Minn. Stat. § 609.341, subd. 11(a).

Here, there is no dispute that appellant engaged in "sexual contact" with the complainant. Appellant also does not dispute that his conduct was done with sexual intent. Appellant freely admits that he tried to put his arm around P.E. when the two

were walking to his apartment. Appellant also admits that he told P.E. that he thought she was hot, and appellant claims that he wanted to start a relationship with P.E. Thus, the only remaining element of fifth-degree criminal sexual conduct is the element of consent.

"Consent" is defined as

> words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

Minn. Stat. § 609.341, subd. 4 (2006).

Here, P.E. did not consent to appellant's conduct, nor did she engage in an overt act indicating that it was permissible for appellant to grab her breasts. In fact, P.E. resisted appellant's attempts to put his arm around her and specifically told appellant that she was engaged. Moreover, no reasonable person would believe that P.E.'s conduct would constitute an overt action indicating that it was permissible for appellant to touch her breasts. Appellant's conduct satisfies all of the elements necessary to find him guilty of criminal sexual conduct under Minn. Stat. § 609.3451, subd. 1(1).

Affirmed.