STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0653

State of Minnesota,
Respondent,

vs.

Thomas Francis LaBlanc,
Appellant.

Filed February 10, 2014
Reversed
Stauber, Judge

Ramsey County District Court
File No. 62CR112944

Lori A. Swanson, Minnesota Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Jeffrey C. Dean, Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Minge, Judge. [*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STAUBER, Judge

Appellant challenges his conviction of soliciting a child to engage in explicit sexual electronic communication in violation of Minn. Stat. § 609.352, subd. 2a(2) (2008). Because the circumstantial evidence was insufficient to support appellant's conviction, we reverse.

FACTS

Appellant Thomas Francis LaBlanc exchanged sexually explicit internet messages with D.S., a minor born June 23, 1993, from January to August of 2009. D.S., who lived in Missouri, was 15 years old for some of that time. Appellant was in his sixties. Appellant and D.S. first communicated on the social networking site MySpace, and also used email to engage in explicit cybersex and exchange nude pictures before D.S.'s 16th birthday.

D.S., who never told appellant his exact age, claimed to be 16 on his MySpace profile. D.S. also revealed facts indicating that he was no older than 16: he told appellant that he was in tenth grade, he was not permitted to drive "till 17 or 18," and he was too young to enter an age-restricted online chat room.

Appellant made several statements indicating that he was concerned about D.S.'s age. Appellant told D.S. "wish u was legal age" in a message in which he asked D.S. to "talk cryptic" because he was concerned that someone might be monitoring his emails. In two other messages, appellant told D.S. "your underage and im caution" and "the law

runs this stuff, so I must respect that, and think, I better be the adult with you and, step back till u r of age."

After appellant's messages were intercepted in a police investigation, he was charged with violating Minn. Stat. § 609.352, subd. 2a(2), which prohibits "engaging in communication relating to or describing sexual conduct with a child or someone the person reasonably believes is a child" via the internet "with the intent to arouse the sexual desire of any person." "Mistake as to age is not a defense to a prosecution" under that statute. Minn. Stat. § 609.352, subd. 3(a) (2008).

Appellant challenged the constitutionality of the statute and moved to dismiss the charge. The district court ruled subdivision 3(a) of the statute unconstitutional because it eliminated the mistake of age as a defense and imposed strict liability. The district court severed subdivision 3(a) from the statute pursuant to Minn. Stat. § 645.20 (2008), and placed the burden of proof on the state "to prove that [appellant] engaged in communication with a child or someone [he] reasonably believed is a child, relating to or describing sexual conduct."[1]

The parties agreed to try the case on stipulated facts under Minn. R. Civ. P. 26.01, subd. 3. The district court found appellant guilty, and sentenced him to a conditionally stayed 365 days in jail. This appeal followed.

[1] We note, and the state appeared to concede at oral argument, that the district court could not entirely rescue the statute from strict liability without also severing the language "a child." Minn. Stat § 609.352, subd. 2(a)(2).

D E C I S I O N

The standard of review for insufficiency of the evidence is the same for both jury and bench trials. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). We conduct a "review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact finder] to reach its verdict." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotations omitted).

We review a conviction based solely upon circumstantial evidence under the two-step test set forth in *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, we "identify the circumstances proved," deferring to the fact finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved." *Id.* Second, we independently review the "reasonableness of all inferences that might be drawn from the circumstances proved," including "inferences consistent with a hypothesis other than guilt." *Id.* (quotation omitted). "[W]e give no deference to the fact finder's choice between reasonable inferences." *Id.* at 329-30 (quotation omitted). "[T]he circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330.

The district court found that D.S. told appellant that he was in tenth grade, that he could not drive "till [he was] 17 or 18," and that he was too young to enter an age-restricted chat room.[2] The district court also found that appellant stated that D.S. was "young," "so young it hurts," too young for appellant, not "of age," and not of "legal

[2] The record does not state the chat room age restrictions.

age." The district court further found that D.S. told appellant that he was in school and living with his parents. The district court concluded that these findings provided "sufficient circumstantial evidence that proves beyond a reasonable doubt that [appellant] believed [D.S.] was less than 16 years of age."

Appellant argues that there is insufficient evidence to support his conviction because the record does not establish beyond a reasonable doubt that appellant knew that D.S. was younger than 16 years old.[3] We agree. The state proved the following circumstances: (1) that appellant was in his sixties at the time of the alleged offense; (2) that D.S. was younger than 16 years old; (3) that appellant knew that D.S. was younger than 17 years old; (4) that D.S.'s "MySpace profile identified him as 16 years of age," and D.S. "did not discuss his age with [appellant] during their online communications"; (5) that appellant and D.S. engaged in electronic communication; and (6) that the communication was sexual and intended to arouse the sexual desires of appellant.

However, in order to be found guilty under Minn. Stat. § 609.352, subd. 2a(2), the communication described in the statute must be with someone that the perpetrator reasonably believes to be a child. And the statute defines "child" as "a person 15 years of age or younger." Minn. Stat. § 609.352, subd. 1(a).

Here, the district court provided no logical explanation for why appellant would have believed that D.S. was 15 or younger instead of exactly 16. Rather, the facts as

[3] Appellant also argued that the entire statute should have been ruled unconstitutional instead of severed. Because the sufficiency of evidence issue is dispositive of the case, we decline to reach the constitutional issue.

proved by the state establish that D.S. listed his age as 16 on his MySpace profile, that he told appellant he was in the tenth grade, and that D.S. never told appellant his age. The stipulated facts also establish that D.S. told appellant that he "don't drive till 17 or 18." Although appellant may have suspected that D.S. was younger than 16 years old, on this record, it is also reasonable to infer that appellant believed that D.S. was 16 years old. And the fact that appellant believed D.S. to be "underage" is not inconsistent with this inference because many people understand "underage" to mean "below the age of majority of 18 years old." There is also no evidence to suggest that appellant understood "underage" to be synonymous exclusively with "younger than 16 years old." Accordingly, because the circumstances proved are not inconsistent with any rational hypothesis except that of guilt, we conclude that the evidence was insufficient to sustain appellant's conviction.

Reversed.