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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1018**

In the Matter of the Welfare of: J. C. L., Child.

**Filed April 25, 2022
Affirmed in part, reversed in part, and remanded
Slieter, Judge
Concurring specially, Cleary, Judge***

Redwood County District Court
File No. 64-JV-19-38

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant J.C.L.)

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Considered and decided by Slieter, Presiding Judge; Connolly, Judge; and Cleary, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant was adjudicated delinquent for disseminating and attempting to aid and abet the dissemination of pornographic work, fifth-degree criminal sexual conduct, and

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

indecent exposure after he sent multiple nude pictures of himself to a 13-year-old victim via Snapchat and asked the victim to send nude pictures of herself. Appellant argues that (1) the pornographic-work statute does not prohibit the act of a juvenile disseminating a pornographic picture of themselves and, therefore, the two dissemination of pornographic work adjudications should be reversed; (2) the district court erred by failing to obtain appellant's personal waiver of his right to testify and, therefore, all adjudications should be reversed; (3) the district court erred by ordering appellant to comply with the predatory-offender-registration statute; and (4) the district court erred by entering adjudications for fifth-degree criminal sexual conduct and an included offense of indecent exposure, and therefore, one adjudication should be reversed.

The plain language of the pornographic-work statute prohibits juveniles from creating and sending pornographic work of themselves. The district court did not err by failing to obtain appellant's personal waiver of his right to testify and ordering appellant to comply with the predatory-offender-registration statute. However, because indecent exposure is an included offense of fifth-degree criminal sexual conduct, the district court erred by entering adjudications for both offenses. Therefore, we affirm in part, reverse in part, and remand.

FACTS

The following facts are undisputed. Appellant J.C.L. and the victim were enrolled at the same school in October 2018. The victim was 13 years old and in eighth grade and J.C.L. was 17 years old and in twelfth grade.

On October 2, 2018, J.C.L. and the victim were communicating “about sports” on their telephones via Snapchat¹ when J.C.L. asked the victim to send him “nude pictures” of herself. J.C.L. asked for nude pictures “15 to 20 times” and “was begging for them.” The victim refused. The next morning, J.C.L. “Snapchatted” the victim and “apologized for what he did,” claiming “he was under the influence and that he doesn’t realize what he is doing when he is high.” The victim told J.C.L. “it was okay and not to do it again.”

That evening, J.C.L. again asked the victim “[m]ultiple times” to send him nude pictures of herself. The victim again refused and told J.C.L. that “he would regret doing that if he kept doing it” because she would block him if he did not stop asking. In response, J.C.L. sent the victim an image of his penis with the words “regret what” superimposed over it. The victim asked J.C.L. to stop but, instead, he sent the victim “multiple” images of his penis, “approximately 20” in total. These images were deleted by the Snapchat app after they were opened.

The victim later informed a school paraprofessional about the Snapchat exchange with J.C.L. Law enforcement was then informed and began an investigation.

J.C.L. was charged in May 2021 in an amended delinquency petition with four counts: (1) dissemination of pornographic work involving a minor, in violation of Minn. Stat. § 617.247, subd. 3(a) (2018); (2) attempt to aid and abet the dissemination of

¹ Through Snapchat, parties can communicate by sending images and text. Most messages are “automatically deleted by default from [Snapchat’s] servers after [Snapchat] detect[s] they’ve been opened by all recipients or have expired.” *Privacy Policy*, Snap Inc., <https://www.snap.com/en-US/privacy/privacy-policy> (last visited Apr. 14, 2022). Therefore, law enforcement is only able to recover messages which have not been deleted.

pornographic work involving a minor, in violation of Minn. Stat. §§ 617.247, subd. 3(a), 609.17, subd. 1 (defining attempt), and 609.05, subd. 1 (defining aiding and abetting) (2018); (3) fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451, subd. 1(2) (2018); and (4) indecent exposure, in violation of Minn. Stat. § 617.23, subd. 2(1) (2018).

J.C.L. did not testify during the court trial, and neither the district court nor counsel inquired as to whether J.C.L. knowingly, intelligently, and voluntarily, waived his right to testify. The district court found the state proved its case beyond a reasonable doubt, it found J.C.L. guilty, and it adjudicated him delinquent of all four counts. Because J.C.L. was 20 years old at the time of adjudication, the district court ordered “no disposition.” However, the district court ordered that J.C.L. “comply with all predatory offender registration requirements . . . for 10 years from the date of [the] order.” J.C.L. appeals.

DECISION

I. The pornographic-work statute prohibits a juvenile from sending pornographic work of themselves.

J.C.L. argues that he “is not guilty of the dissemination of a pornographic work” because the plain language of the pornographic-work statute reflects the legislature’s intent to exclude from prosecution juveniles, such as J.C.L., who create and send sexually explicit images of themselves. Therefore, J.C.L. argues, there is insufficient evidence to adjudicate him of disseminating pornographic work.

Generally, when reviewing a sufficiency-of-the-evidence claim, appellate courts consider whether a reasonable jury could conclude that the defendant was guilty beyond a

reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). But we review *de novo* sufficiency-of-the-evidence claims that only present a question of statutory interpretation “on the meaning of the statute under which a defendant has been convicted.” *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). During oral argument, J.C.L.’s counsel confirmed that the sole basis for his insufficiency-of-the-evidence claim is the meaning of the pornographic-work statute. Our *de novo* review follows.

“When interpreting a statute, the first question is whether the language of a statute is ambiguous.” *Id.* at 920. “The plain language of the statute controls when the meaning of the statute is unambiguous.” *State v. Boecker*, 893 N.W.2d 348, 351 (Minn. 2017). To determine a statute’s plain meaning, the statute’s “words and phrases are construed according to rules of grammar and according to their common and approved usage.” Minn. Stat. § 645.08(1) (2020). When determining whether a statute is ambiguous, we give words and phrases their ordinary meaning. *State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018). “The statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as whole.” *Pakhnyuk*, 926 N.W.2d at 920. It is presumed that “the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17(2) (2020).

The pornographic-work statute, of which J.C.L. was adjudicated delinquent, provides that “[a] *person* who disseminates pornographic work to an adult or a minor, knowing or with reason to know its content and character, is guilty of a felony.” Minn. Stat. § 617.247, subd. 3(a) (emphasis added). The statute does not define “person.” “In the absence of a statutory definition, we look to dictionary definitions to determine the

plain meaning of words” and “apply them in the context of the statute.” *State v. Haywood*, 886 N.W.2d 485, 490, 488 (Minn. 2016); *see also State v. Serbus*, 957 N.W.2d 84, 88 (Minn. 2021). The dictionary defines person as “[a] living human.” *The American Heritage Dictionary of the English Language* 1317 (5th ed. 2018); *see also Merriam-Webster’s Collegiate Dictionary* 924 (11th ed. 2014) (defining “person” as a “human”). Therefore, based on this dictionary definition, the pornographic-work statute applies to all humans, and J.C.L. is “a person” who is subject to this statute.

A review of other provisions in this statute reinforces this interpretation because it shows that the legislature will, when it so desires, differentiate between adults and minors. First, the pornographic-work statute provides an “affirmative defense to a charge of violating this section [if] the pornographic work was produced using only *persons who were 18 years or older*.” Minn. Stat. § 617.247, subd. 8 (2018) (emphasis added). Second, “pornographic work” is defined as, among other things, “any visual depiction . . . that: uses *a minor* to depict actual or simulated sexual conduct,” and a “minor” is defined as “any person under the age of 18.” Minn. Stat. § 617.246, subd. 1(f)(2)(i) (emphasis added), (b) (2018).

Moreover, were we to adopt J.C.L.’s interpretation of this statute as excluding from criminal behavior a juvenile disseminating pornographic work of themselves, it would effectively “add words or meaning to a statute that were intentionally or inadvertently

omitted.” *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012); *see also State v. Jorgenson*, 946 N.W.2d 596, 607 (Minn. 2020). This we cannot do.²

In sum, the pornographic-work statute is unambiguous and its plain language reflects the legislature’s intent to prohibit juveniles from creating and disseminating pornographic work of themselves. Therefore, there is sufficient evidence to adjudicate J.C.L. of disseminating pornographic work.³

II. Failing to obtain a knowing, intelligent, and voluntary waiver from J.C.L. of his right to testify does not result in a new trial.

J.C.L. argues that the district court erred because it failed to advise him of his right to testify and did not seek his knowing and voluntary personal waiver of that right before proceeding with trial. As a result, J.C.L. requests that we vacate the adjudications and remand for a new trial.

² J.C.L. relies on the statute’s policy and purpose statement in subdivision 1 to argue that the statute unambiguously precludes criminalizing a juvenile for this behavior. *See* Minn. Stat. § 617.247, subd. 1. We are not persuaded. The criminal elements are unambiguously described in subdivision 3 of the statute, and the policy statement does not contradict this unambiguous language. J.C.L.’s reliance on *State v. Rhoades*, 690 N.W.2d 135, 139 (Minn. App. 2004), for this proposition is also unavailing. In *Rhoades* we concluded that the statute’s policy statement “plainly establishes the legislature’s intent to punish possession of child pornography as a crime that victimizes, or harms, the minor subject of the pornographic work,” and, therefore, the district court is not precluded from imposing more than one sentence for multiple offenses committed in a single behavioral incident. 690 N.W.2d at 138-40. Thus, the sentencing issue decided by *Rhoades* has no application to the issue in this matter.

³ J.C.L. relies on the same argument to assert that there is insufficient evidence to adjudicate him of attempting to aid and abet the dissemination of pornographic work. For the reasons discussed, the pornographic-work statute prohibits a juvenile from sending pornographic work of themselves, and therefore, there is sufficient evidence to adjudicate J.C.L. of attempting to aid and abet the dissemination of pornographic work.

Determining whether the rules of criminal procedure have been properly interpreted is a question of law subject to *de novo* review. *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998); *see also In re Welfare of M.E.M.*, 674 N.W.2d 208, 214 (Minn. App. 2004). The right of a defendant to testify on his or her own behalf is a fundamental constitutional right and must be knowingly, intelligently, and voluntarily waived. *M.E.M.*, 674 N.W.2d at 214. The right is personal to the defendant and cannot be waived by his counsel. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997); *see In re Gault*, 387 U.S. 1, 31 (1967) (holding that “due process and fair treatment” apply to juvenile proceedings) (quotation omitted).

In *State v. Smith*, the supreme court held that when the record is silent as to the waiver of the right to testify, the reviewing court “must presume that the decision not to testify was made by [the] defendant voluntarily and intelligently.” 299 N.W.2d 504, 506 (Minn. 1980). We adopted this rule in juvenile delinquency proceedings in *M.E.M.*, holding that, when “the record is silent regarding whether appellant waived his right to testify . . . appellant is presumed to have personally waived his right to testify.” 674 N.W.2d at 214. We reiterated our adoption of this rule the following year in *In re Welfare of C.J.W.J.*, 699 N.W.2d 328, 334 (Minn. App. 2005).

The record is silent on J.C.L.’s waiver of his right to testify. Accordingly, the law requires us to presume that the decision not to testify was made voluntarily and intelligently and that J.C.L., therefore, properly waived his right to testify. *M.E.M.*, 674 N.W.2d at 214; *C.J.W.J.*, 699 N.W.2d at 334.⁴

⁴ J.C.L. argues we should ignore precedent and not apply *Smith* in juvenile cases. We cannot do so. This court has repeatedly stated that its precedential opinions are binding on

III. The district court did not err by ordering J.C.L. to comply with the predatory-offender-registration statute pursuant to Minn. Stat. § 243.166 (2020).

J.C.L. argues that the district court erred in ordering him to comply with the predatory-offender-registration statute.

“The interpretation of the predatory sex-offender registration statute, like interpretation of all statutes, is a question of law which we review de novo.” *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 247 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002). In Minnesota, the requirement to register as a predatory offender is a collateral consequence of a conviction or adjudication. *See State v. Ellis-Strong*, 899 N.W.2d 531, 536 (Minn. App. 2017) (stating that registration is a collateral consequence of a guilty plea). The mandatory registration requirement is regulatory and not punitive. *In re Welfare of C.D.N.*, 559 N.W.2d 431, 433 (Minn. App. 1997), *rev. denied* (Minn. May 20, 1997); *see also Werlich v. Schnell*, 958 N.W.2d 354, 362-63 (Minn. 2021) (allowing some “constitutional challenges to the expanded statutory consequences of predatory offender registration” without questioning the nonpunitive nature of the underlying registration).

We note that the district court merely ordered appellant to “comply with all predatory offender registration requirements.” This is not an error. The predatory-offender-registration statute requires a person to register if the person “was charged with or petitioned for a violation of, or attempt to violate, or aiding, abetting, or conspiring to

this court and on the district courts. *See, e.g., State v. Chauvin*, 955 N.W.2d 684, 689-90 (Minn. App. 2021), *rev. denied* (Minn. Mar. 10, 2021); *State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013); *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *rev. denied* (Minn. Sept. 21, 2010).

commit” an enumerated offense “and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances.” Minn. Stat. § 243.166, subd. 1b(a)(1). And when a person is required to register pursuant to that statutory provision, “the court shall tell the person of the duty to register under this section.” *Id.*, subd. 2. Moreover, a person required to register must do so with their “corrections agent” or “with the law enforcement authority that has jurisdiction in the area of the person’s primary address.” *Id.*, subd. 3(a). Therefore, the district court’s order to “comply with all predatory offender registration requirements” was not an error.

Furthermore, J.C.L. was adjudicated delinquent of dissemination of pornographic work pursuant to Minn. Stat. § 617.247, subd. 2(a). This is an offense enumerated for predatory registration. Minn. Stat. § 243.166, subd. 1b(a)(2)(vii). Thus, J.C.L. was statutorily required to register as a predatory offender.

Therefore, the district court did not err by ordering J.C.L. to comply with the predatory-offender-registration statute.

IV. The district court erred by entering adjudications for both indecent exposure and fifth-degree criminal sexual conduct.

J.C.L. argues that the district court erred by adjudicating him delinquent of both indecent exposure and fifth-degree criminal sexual conduct because “indecent exposure is an included offense of fifth-degree criminal sexual conduct.”

Minnesota law provides that “[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2018). The Minnesota Supreme Court has interpreted Minn. Stat.

§ 609.04 to “bar[] multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Whether a conviction violates Minn. Stat. § 609.04 (2018) is a legal question that we review *de novo*. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Definitions of an “included offense” include “a lesser degree of the same crime” and “a crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1(1), (4). Another way to describe it is that “[a] lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former.” *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). “In determining whether an offense is a necessarily included offense, we must look at the elements of the offense rather than the facts of the particular case.” *Id.*

J.C.L. was adjudicated delinquent of gross misdemeanor indecent exposure, in violation of Minn. Stat. § 617.23, subd. 2(1), and gross misdemeanor fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451, subd. 1(2). Gross misdemeanor indecent exposure requires proof that a person “willfully and lewdly exposes the person’s body, or the private parts thereof . . . in the presence of a minor under the age of 16.” Minn. Stat. § 617.23, subds. 1(1)-2(1) (2018). Gross misdemeanor fifth-degree criminal sexual conduct requires proof that a “person engages in . . . lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.” Minn. Stat. § 609.3451, subd. 1(2).

Both offenses require the *mens rea* element of either willfulness or knowledge that the defendant knew the facts that made his conduct illegal. Minn. Stat. §§ 609.3451,

subd. 1(2), 617.23, subds. 1(1)-2(1); *see State v. Ndikum*, 815 N.W.2d 816, 818 (Minn. 2012) (“Mens rea is the element of a crime that requires the defendant know the facts that make his conduct illegal.” (quotation omitted)). And both offenses require lewd exposure or exhibition of private parts, which include genitals, in the presence of a minor under age 16. Minn. Stat. §§ 609.3451, subd. 1(2), 617.23, subds. 1(1)-2(1).⁵ Therefore, one cannot commit the elements of fifth-degree criminal sexual conduct without necessarily committing the elements of indecent exposure.

Thus, the district court erred by adjudicating J.C.L. delinquent of both offenses. We remand to the district court for its discretionary determination as to which adjudication to vacate.

Affirmed in part, reversed in part, and remanded.

⁵ The state claims that the criminal statute Minn. Stat. § 609.04 does not apply to juvenile delinquency proceedings, and contends that *In re Welfare of K.A.Z.*, 266 N.W.2d 167, 170 (Minn. 1978), which held that Minn. Stat. § 609.04 “applies in juvenile proceeding,” is merely “dictum and not binding.” We disagree. The *K.A.Z.* court directly addressed the same issue involving Minn. Stat. § 609.04 and, citing *In re Welfare of Raino*, 255 N.W.2d 398, 399 (Minn. 1977), stated “[t]he statute applies to juvenile proceedings.” This is not *dicta* and we are bound by its precedence. *See Chauvin*, 955 N.W.2d at 689-90.

CLEARY, Judge (concurring specially)

While I agree with the majority as to affirming in part, reversing in part, and remanding, I write specially to highlight my disagreement with the current state of the law as to the significance of the failure to obtain a knowing, intelligent, and voluntary waiver of the right to testify, particularly when the defendant is a juvenile. The right is personal to the defendant and cannot be waived by his counsel. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). Here, it appears that the district court failed to advise J.C.L. of his personal right to testify and did not seek to elicit his waiver of that right. Not making a record is particularly egregious when the defendant is a juvenile, as in this case. Because the record is silent as to any waiver, we are bound by an opinion that is four decades old, *State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980), to presume that the decision not to testify was made by the defendant in a knowing, voluntary, and intelligent manner.

It appears to me that presuming that a fundamental constitutional right has been properly waived in the face of a silent record is illogical and counterintuitive. Rather, the presumption should be otherwise. I do not believe that it is asking too much of the district courts to take a few minutes to inquire of the defendant on the record as to his decision not to testify, outside the hearing of the jury, to ensure that this fundamental constitutional right is being honored appropriately. It has long been acknowledged that it is the best practice for a district court to do so. It is time to make it a requirement.

When the record is silent due to the failure of the court to make a brief record of a waiver, the presumption should be that a knowing, voluntary, and intelligent waiver has not occurred. I believe that making inquiry into waiver a required duty is necessary when a fundamental constitutional right is at stake.