STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
CRIMINAL COURT DIVISION

State of Minnesota,

Plaintiff,

vs.

The Archdiocese of Saint Paul and Minneapolis,
a Minnesota Corporation
226 Summit Avenue
Saint Paul, MN 55102,

Defendant.

Court File No: 62-CR-15-4175

AFFIDAVIT OF ANDREW F. JOHNSON SUPPORTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Andrew F. Johnson, being first duly sworn upon oath, states as follows:

1. I am one of the attorneys representing the Archdiocese of Saint Paul and Minneapolis. I submit this Affidavit in connection with Defendant's Motion to Dismiss the Complaint.

2. Attached as Exhibit A is a true and accurate copy of the November 7, 2002 Restated Articles of Incorporation of the Archdiocese of Saint Paul and Minneapolis.

3. Attached as Exhibit B are true and complete copies of publically available business records from the Minnesota Secretary of State's website concerning the corporate structure of The Church of the Blessed Sacrament of St. Paul.

4. Attached as Exhibit C is a true and complete copy of the Final Jury Instructions used in *State v. Final Exit Network, Inc.,* 19HA-CR-12-1718 (Dakota County, May 14, 2015).

5. Attached as Exhibit D are true and accurate copies of several cases cited in Defendant's Memorandum Supporting Its Motion to Dismiss the Criminal Complaint, including all unpublished cases required by Minnesota Statute § 480A.08(3).

Andrew F. Johnson

Subscribed and sworn to before me
this 29th day of January, 2016.

Notary Public

CYNTHIA L. THOMAS
NOTARY PUBLIC - MINNESOTA
My Commission Expires
January 31, 2020

EXHIBIT A

CH-600 NP- BO/RA

9057060002

CORPORATE RESOLUTION
OF THE
ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS

BE IT RESOLVED, That the Articles of Incorporation of the Archdiocese of Saint Paul and Minneapolis, a Minnesota corporation organized and existing under the laws of the State of Minnesota, being Section 315.16, are hereby restated to include therein all amendments made to the original Articles of Incorporation adopted on November 3rd, 1970:

RESTATED ARTICLES OF INCORPORATION

Article 1. The name of this corporation shall be The Archdiocese of Saint Paul and Minneapolis and the location of its registered office shall be 226 Summit Avenue, St. Paul, MN 55102.

Article 2. The general purpose of this corporation is to take charge of, and manage, all temporal affairs of the Romany Catholic Church to the said Archdiocese belonging or in any wise appertaining, to promote the spiritual, educational and other interests of the Roman Catholic Church in said Archdiocese, including all the charitable, benevolent, eleemosynary and missionary work of said Church in said Archdiocese and to establish and maintain Churches and Cemeteries therein and also to establish and conduct schools, seminaries, colleges and any benevolent, charitable, religious or missionary work or society of the said Roman Catholic Church within said Archdiocese, to take charge of, hold and manage, all property, personal and real, that may at any time or in any manner come to, or vest in, this corporation for any purpose whatever for the use and benefit of said Archdiocese and for the use and benefit of the Roman Catholic Church therein, whether by purchase, gift, grant, devise or otherwise, and to mortgage the same, sell or otherwise dispose of it as the necessities or best interests of said corporation in the opinion of the members thereof may require.

Article 3. The Members of this corporation shall be the Archbishop, the Vicar General and the Chancellor of the Archdiocese of Saint Paul and Minneapolis, and two other members of the Roman Catholic Church, residents of the Archdiocese of Saint Paul and Minneapolis, selected and appointed by the said Archbishop, the Vicar General and the Chancellor, or a majority of them. The term of office for each of the aforesaid two appointed members shall be for a period of two years of until his successor is chosen.

Article 4. The Board of Directors shall be composed of not less than five (5) directors. The five (5) Members of the corporation, namely, the Archbishop, the Vicar General, and the Chancellor of The Archdiocese of Saint Paul and Minneapolis and the two (2) other Members of the corporation selected and chosen as aforesaid, and their respective successors shall always be members of

the Board of Directors. The other directors shall be selected by a majority vote of the five (5) Members of the corporation at a regular meeting of the corporation, and the term of office for such elected directors shall be for a period of two (2) years or until their successors have been duly elected and qualified. The Board of Directors shall have power to transact all business of said corporation.

Article 5. The officers of said corporation shall be a President, a Vice President, a Treasurer and a Secretary and such other officers as shall be provided for in the By-Laws. The Archbishop or person appointed in his place or stead shall be ex officio President. The Vicar General shall be ex officio Vice President. The Secretary and the Treasurer shall be chosen from the Members of said corporation provided that the offices of Secretary and Treasurer may be held by the same person. The term of office of the Secretary and Treasurer and other officers provided for in the By-Laws, and the duties of each, except so far as the same are fixed by the Articles, may be prescribed by the By-Laws. The Board of Directors may at any time remove the Secretary or Treasurer if the Board of Directors shall deem that the best interests of the corporation require such removal.

Article 6. No real estate belonging to said corporation may be sold, mortgaged, encumbered or disposed of in any way without the consent of a majority of the Directors, provided such majority shall include the Archbishop or the Vicar General.

Article 7. The said Directors may by a two-thirds majority vote adopt such By-Laws, not contrary to the laws of this State and the discipline of the Roman Catholic Church and these Articles, as may be deemed necessary for the proper government of this corporation and the management of the property and business thereof and may by a like vote alter or amend the same and when so adopted such By-Laws and all amendments thereof shall be recorded by the Secretary in a book to be provided and kept for that purpose.

Article 8. To the full extent permitted by law, the Corporation shall indemnify each person who is or was a member, director, officer or employee of the Corporation for judgments, payments, costs and expenses paid or incurred by any of them as a result of any action, suit or proceeding to which such person may be a party by reason of his or her said capacity with the Corporation, unless is otherwise adjudged that such person did not act in good faith or in the best interests of the Corporation.

In criminal cases, such right of indemnification shall only apply if the person is found not guilty and only if a majority of the directors find that such person acted in good faith in the best interests of the Corporation.

The Corporation may provide and maintain insurance on behalf of any such person indemnified by the terms of this Article.

BE IT FURTHER RESOLVED, That an officer of this corporation is hereby directed to execute an appropriate certificate of Restated Articles of Incorporation for filing in the office of the Secretary of State of the State of Minnesota, and such other public offices as they deem appropriate, and the officers are directed to file and record said certificate, according to law.

DIOCESAN CORPORATION AFFIDAVIT/CERTIFICATE

BE IT RESOLVED, That the Restated Articles of Incorporation and the Restated By-Laws attached hereto are hereby approved and adopted.

The resolution following was adopted unanimously, in writing, by the members and directors of the Archdiocese of Saint Paul and Minneapolis, a Minnesota religious diocesan corporation, organized and existing pursuant to Minnesota Statutes Section §315.16 on the 7th day of November, 2002, at the annual meeting of the members and directors of said corporation.

I, William S. Fallon, the duly elected, qualified and acting Secretary of The Archdiocese of Saint Paul and Minneapolis, do hereby certify that the attached is a true copy of the resolution adopted by the members of said corporation on the aforementioned date and is now in full force and effect, and that the members of said corporation have and at the time of adoption of the said resolution had full power and lawful authority to adopt said resolution.

William S. Fallon
Secretary

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

On this 12th day of June, 2003, in the said County of Ramsey, before me, a Notary Public duly commissioned and qualified, in and for the State and County aforesaid, personally known to me to be the person described in and who executed the foregoing certificate, and acknowledged to me that he executed the same; and being by me duly sworn, did depose and say that he executed the same; and being by me duly sworn, did depose and say that he is the Secretary of said corporation and a member of said corporation; that as such officer, he keeps the corporate minute books and seal of the said corporation; and that the foregoing certificate is true of his own knowledge.

Subscribed and sworn to before me this 12th day of June, 2003.

Kathleen M. Owen
Notary Public

KATHLEEN M. OWEN
NOTARY PUBLIC-MINNESOTA
MY COMMISSION EXPIRES 1-31-2005

THIS INSTRUMENT WAS DRAFTED BY:

William S. Fallon
226 Summit Ave.
St. Paul, MN 55102

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

MAY 17 2004

Mary Kiffmeyer
Secretary of State

CRK

EXHIBIT B

Minnesota Business and Lien System, Office of the Minnesota Secretary of State

Business Record Details »

Minnesota Business Name

Blessed Sacrament Catholic Church

Business Type
Assumed Name

MN Statute
333

File Number
804042400022

Home Jurisdiction
Minnesota

Filing Date
1/5/2015

Status
Active / In Good Standing

Renewal Due Date
12/31/2016

Registered Agent(s)
(Optional) None provided

Principal Place of Business Address
2119 Stillwater Avenue East
St. Paul, MN 55119
USA

Nameholder	Nameholder Address
The Church of the Blessed Sacrament of St. Paul	2119 Stillwater Avenue East, St. Paul, MN 55119

Filing History

Filing History

Select the item(s) you would like to order: Order Selected Copies

	Filing Date	Filing	Effective Date
☐	1/5/2015	Original Filing - Assumed Name	

Minnesota Business and Lien System, Office of the Minnesota Secretary of State

Business Record Details »

Minnesota Business Name

The Church of the Blessed Sacrament of St. Paul

Business Type
General Entity

File Number
CH-85

Filing Date
09/21/1916

Status
Active / In Good Standing

Registered Office Address

St Paul, MN
USA

Number of Shares
NONE

Registered Agent(s)
(Optional) None provided

Comments
315

Filing History

Filing History

Select the item(s) you would like to order: Order Selected Copies

	Filing Date	Filing	Effective Date
☐	09/21/1916	Original Filing - General Entity	

EXHIBIT C

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Final Exit Network, Inc.,

Defendant.

FINAL INSTRUCTIONS

Court File No.: **19HA-CR-12-1718**

The evidence has now concluded. It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.

I have not by these instructions, nor by any ruling or expression I may have made during the trial, intended to indicate my opinion regarding the facts or the outcome of this case. If I said or did anything which would seem to indicate such an opinion, you are to disregard it.

PRESUMPTION OF INNOCENCE

The Defendant is presumed innocent of the charges brought against it, and that presumption abides with it unless and until the Defendant has been proved guilty beyond a reasonable doubt. That the Defendant is on trial and has been brought before the court by the ordinary processes of the law should not be considered by you as in any way suggesting guilt. The burden of proving guilt beyond a reasonable doubt is on the State. The Defendant does not have to prove its innocence.

PROOF BEYOND A REASONABLE DOUBT

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

A fact may be proved by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proved by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

RULINGS ON OBJECTIONS TO EVIDENCE

During this trial I may rule on objections to certain testimony and/or exhibits. You must not concern yourself with the reasons for the rulings since they are controlled by rules of law.

By receiving evidence to which objection was made, I do not intend to indicate the weight to be given such evidence. You are not to speculate as to possible answers to questions, which I do not require to be answered. You are to disregard all evidence which I may order stricken or have told you to disregard.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

You must consider these instructions as a whole and regard each instruction in light of all the others. The order in which the instructions are given is of no significance. You are free to consider the issues in any order you wish.

NOTES TAKEN BY JURORS

You have been allowed to take notes during the trial. You may take those notes with you to the jury room. You should not consider these notes binding or conclusive, whether they are your notes or those of another juror. The notes should be used as an aid to your memory and not as a substitute for it. It is your recollection of the evidence that should control. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror.

STATEMENTS OF JUDGE AND ATTORNEYS

Attorneys are officers of the Court. It is their duty to make such objections as they deem proper and to argue their client's cause. However, the arguments or other remarks of an attorney are not evidence.

If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, then you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.

EVALUATION OF TESTIMONY – BELIEVABILITY OF WITNESSES

You are the sole judges of whether a witness is to be believed and of the weight to be given to a witness's testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness's:

1. Interest or lack of interest in the outcome of the case,
2. Relationship to the parties,
3. Ability and opportunity to know, remember, and relate the facts,
4. Manner,
5. Age and experience,
6. Frankness and sincerity, or lack thereof,
7. Reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case,
8. And any other factors that bear on believability and weight.

In the last analysis, you should rely upon your own experience, good judgment, and common sense.

EXPERT TESTIMONY

A witness who has special training, education, or experience in a particular science, occupation, or calling, is allowed to express an opinion as to certain facts. In determining the believability and weight to be given such opinion evidence, you may consider:

(1) The education, training, experience, knowledge, and ability of the witness;

(2) The reasons given for the opinion;

(3) The sources of the information; and

(4) Factors already given you for evaluating the testimony of any witness.

Such opinion evidence is entitled to neither more nor less consideration by you than any other evidence.

MULTIPLE OFFENSES CONSIDERED SEPARATELY

In this case, the Defendant has been charged with multiple offenses. You should consider each offense, and the evidence pertaining to it, separately. The fact that you may find the Defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.

JUROR'S RESPONSIBILITY

You must not allow sympathy, prejudice, or emotion to influence your verdict. The quality of your service will be reflected in the verdict you return to this court. A just and proper verdict contributes to the administration of justice.

CRIMINAL LIABILITY OF A CORPORATION

Defendant Final Exit Network Inc. is a corporation. A corporation can be held criminally liable, but only for the acts of its agents. An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.

COUNT I:

ASSISTING SUICIDE – DEFINED

The statutes of Minnesota provide that whoever intentionally assists another in taking the other's own life is guilty of a crime.

ASSISTING SUICIDE – ELEMENTS

The elements of assisting suicide are:

First, that Doreen Dunn took her own life.

Second, the Defendant's agent(s) intentionally assisted Doreen Dunn in taking her own life.

> An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.
>
> "Intentionally" means that the Defendant's agent(s) either acted with the purpose of assisting Doreen Dunn in taking her own life, or believed that its act(s), if successful, would assist Doreen Dunn in taking her own life. In addition, the Defendant's agent(s) must have had knowledge of those facts that are necessary to make its conduct criminal.
>
> To "assist" means that the Defendant's agent(s) enabled Doreen Dunn through either physical conduct or words that were specifically directed at Doreen Dunn and that the conduct or words enabled Doreen Dunn to take her own life. One has not "assisted" where one has only expressed a moral viewpoint on suicide or provided mere comfort or support.

Third, that all of the above acts took place on or about February 1, 2007 through May 30, 2007 in Dakota County, Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, there are additional elements you must consider. The State must additionally prove beyond a reasonable doubt that:

Fourth, the agent(s) were acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally;

Fifth, the agent(s) were acting, at least in part, in furtherance of the corporation's business interests; and

Sixth, the criminal acts were authorized, tolerated, or ratified by corporate management. An act is ratified if, after it is performed, another agent of the corporation, having knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct.

If you find that each of these six elements has been proven beyond a reasonable doubt, the Defendant is guilty of assisting suicide.

If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty of assisting suicide.

COUNT II:

INTERFERENCE WITH DEAD BODY OR SCENE OF DEATH – DEFINED

The statutes of Minnesota provide that whoever interferes with the body or scene of death with intent to mislead the medical examiner or conceal evidence is guilty of a crime.

INTERFERENCE WITH DEAD BODY OR SCENE OF DEATH – ELEMENTS

The elements of interference with dead body or scene of death are:

First, that Doreen Dunn died.

Second, that the Defendant's agent(s) interfered with Doreen Dunn's body or scene of her death. A defendant's agent(s) interferes with a body or scene of death if they perform a physical act which changes the position of the deceased body or physical surroundings in which the death took place.

> An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.

Third, that the Defendant's agent(s) interfered with Doreen Dunn's body or scene of her death with the intent to mislead the medical examiner or conceal evidence.

Fourth, that all the above acts took place on or about May 30, 2007 in Dakota County, Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, there are additional elements you must consider. The State must additionally prove beyond a reasonable doubt that:

Fifth, the agent(s) were acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally;

Sixth, the agent(s) were acting, at least in part, in furtherance of the corporation's business interests; and

Seventh, the criminal acts were authorized, tolerated, or ratified by corporate management. An act is ratified if, after it is performed, another agent of the corporation, having knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct.

If you find that each of these seven elements has been proven beyond a reasonable doubt, the Defendant is guilty of interference with dead body or scene of death.

If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty of interference with dead body or scene of death.

CONSEQUENCES OF VERDICTS

Now, perhaps you have noticed that nothing has been mentioned about penalties to Final Exit Network, Inc. in this case. That was intentional. There is a reason for that. You are instructed that you are not to be concerned with the consequences of your verdicts. Punishment, in the event the Defendant is convicted of any offense, is not your concern. It is the sole concern of the Court. You are not to speculate upon, nor consider it in deliberations upon or arriving at your verdicts.

UNANIMOUS VERDICT – DUTY OF JURORS TO DISCUSS

When you return to the jury room to discuss this case you must select a jury member to be foreperson. That person will lead your deliberations.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

After you have retired for your deliberation, if the Jury should have any question or request, you are instructed to write this down on a piece of paper and have it dated with the time noted and have the foreperson sign it and give it to the jury attendant. The jury attendant will then give it to the Court for its due consideration and response.

You will be given a verdict form. The verdict form is self-explanatory.

If you find that the State has proved beyond a reasonable doubt that the defendant is guilty of assisting suicide, you will circle guilty on the verdict form. If you find that the State has failed to prove beyond a reasonable doubt that the defendant is guilty of assisting suicide, you will circle not guilty on the verdict form.

If you find that the State has proved beyond a reasonable doubt that the defendant is guilty of interference with dead body or scene of death, you will circle guilty on the verdict form. If you

find that the State has failed to prove beyond a reasonable doubt that the defendant is guilty of interference with dead body or scene of death, you will circle not guilty on the verdict form.

Upon retiring to the jury room you will select one of your members to act as your foreperson who will preside over your deliberations. You may choose a foreperson in any manner that you see fit. Your foreperson must sign and date the verdict form that reflects your unanimous decision. After you have all agreed upon the verdict that reflects your unanimous decision, the verdict form must be signed and dated by your foreperson. You should then notify the bailiff so that you can return to court with your verdict, at which point your verdict will be read aloud in open court. You will be asked if this is your true verdict, after which you will be discharged from any further duty with respect to this case.

Determine what the facts are. Accept what you believe to be true. Reject anything you believe to be untrue. Once you determine what happened, apply the law as I have given it to you, and render a decision in this case. You must set aside sympathy, emotion, and prejudice in making your decision.

Remember, you are not advocates; you are judges – judges of the facts. The final test of the quality of your service will lie in the verdict that you return to the Court, and not in the opinions any of you may have as you retire from this case. Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court reminds you that in your deliberations in the jury room, there can be no triumph except the ascertainment and declaration of the truth. Remember that this case is important to both sides. It is important in that a corporation who is guilty of committing a crime should be brought to justice. It is equally important that a corporation who is not guilty of committing a crime should not be punished for something the corporation did not do. The Court has every confidence that you will fairly, objectively, and dispassionately carry out your duties.

EXHIBIT D

741 N.W.2d 79
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
John Joseph BUSSMANN, Appellant.

No. A05–1782.
|
Nov. 1, 2007.
|
Rehearing Denied Nov. 28, 2007.

Synopsis

Background: Defendant was convicted, after a jury trial in the District Court, Hennepin County, Diana Eagon, J., of two counts of third-degree criminal sexual conduct by a member of the clergy. Defendant appealed. The Court of Appeals, 2006 WL 2673294, affirmed. Review was granted.

Holdings: The Supreme Court, Hanson, J., held that:

[1] clergy criminal sexual conduct statute is not unconstitutionally vague;

[2] clergy criminal sexual conduct statute does not facially violate the Establishment Clause; but

[3] clergy criminal sexual conduct statute, as applied in defendant's case, violated Establishment Clause.

Affirmed in part, reversed in part, and remanded for new trial.

Page and Meyer, JJ., joined in Parts I, II.A, and III of the opinion of Justice Hanson.

Paul H. Anderson, filed an opinion joining in Parts I, II.B, and III of the opinion of Justice Hanson.

G. Barry Anderson, J., joined in Parts I, II.B, and III of the opinion of Justice Hanson.

Russell A. Anderson, C.J., filed a dissenting opinion.

West Headnotes (14)

[1] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Minnesota statutes are presumed to be constitutional.

3 Cases that cite this headnote

[2] **Constitutional Law**
Judicial Authority and Duty in General

Constitutional Law
Necessity of Determination

The court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.

6 Cases that cite this headnote

[3] **Criminal Law**
Review De Novo

Constitutional challenges are questions of law, which are reviewed de novo.

13 Cases that cite this headnote

[4] **Constitutional Law**
Vagueness

The due process void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 14.

16 Cases that cite this headnote

[5] **Constitutional Law**
Vagueness

Speculation about possible vagueness in hypothetical situations not before the court will

not support a facial attack on a penal statute, under the due process void-for-vagueness doctrine, when it is surely valid in the vast majority of its intended applications. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[6] **Constitutional Law**
Sex offenses, incest, and prostitution

Rape
Statutory provisions

The terms "ongoing" and "religious or spiritual advice, aid, or comfort," as used in clergy sexual conduct statute, which makes it a crime for a member of the clergy to engage in sexual penetration with a person who is meeting with the clergy member on an ongoing basis to seek or receive religious or spiritual advice, aid, or comfort in private, have acquired a reasonably definite meaning and are not unduly vague, for purposes of the Due Process Clause. U.S.C.A. Const.Amend. 14; M.S.A. § 609.344(1)(*l*)(ii).

6 Cases that cite this headnote

[7] **Constitutional Law**
Vagueness

Due process requirements are satisfied, for purposes of the void-for-vagueness doctrine, if the penal statute specifies standards of conduct in terms that have acquired meaning involving reasonably definite standards either according to the common law or by long and general usage. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[8] **Constitutional Law**
First Amendment in General

The overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment context, a challenge to a statute both on its face and as applied to the defendant. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Sexual misconduct by clergy

Constitutional Law
Privacy and Sexual Matters

Members of the clergy have neither a First Amendment interest nor a due process liberty interest in sexual activity gained through exploitation of the clergy-counselee relationship. U.S.C.A. Const.Amends. 1, 14.

1 Cases that cite this headnote

[10] **Constitutional Law**
Criminal Law

Rape
Statutory provisions

The clergy sexual conduct statute, which makes it a crime for a member of the clergy to engage in sexual penetration with a person who is seeking or receiving religious or spiritual advice, aid, or comfort in private, does not facially violate the Establishment Clause. (Per Hanson, J., for an equally divided court.) U.S.C.A. Const.Amend. 1; M.S.A. § 609.344(1)(*l*)(ii).

6 Cases that cite this headnote

[11] **Constitutional Law**
Criminal Law

Rape
Statutory provisions

Conviction of priest under clergy sexual conduct statute, which makes it a crime for a member of the clergy to engage in sexual penetration with a person who is seeking or receiving religious or spiritual advice, aid, or comfort in private, caused excessive governmental entanglement with religion, and thus, the statute was unconstitutional as applied; trial court admitted extensive evidence regarding religious doctrine and church policies and practices, e.g., Catholic Church's doctrine on religious power of priests over parishioners and Catholic Church's concerns about priest sexual misconduct, virtually all of such evidence lacked foundation to connect it to any secular standard and was irrelevant to any secular standard,

and such evidence provided religious standards by which jury was to judge priest's conduct. U.S.C.A. Const.Amend. 1; M.S.A. § 609.344(1)(*l*)(ii).

4 Cases that cite this headnote

[12] **Constitutional Law**
First Amendment

The Establishment Clause applies to the several states by virtue of the Fourteenth Amendment's Due Process Clause. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[13] **Constitutional Law**
State government

Official acts of state judicial officers are subject to the Due Process Clause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Establishment of Religion

The official acts of state judicial officers must satisfy the three Establishment Clause requirements articulated by the United States Supreme Court in *Lemon v. Kurtzman*: (1) they must have a secular purpose; (2) they must have a principal effect that neither advances nor inhibits religion; and (3) they must not excessively entangle government and religion. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

West Codenotes

Unconstitutional as Applied
M.S.A. § 609.344, subd. 1(l)(ii)

81** ***Syllabus by the Court

1. The terms "ongoing" and "religious or spiritual advice, aid, or comfort," as used in the clergy criminal sexual conduct statute, Minn.Stat. § 609.344, subd. 1(*l*)(ii) (2006), have acquired a reasonably definite meaning and are not unduly vague for the purposes of the Due Process Clause of the United States Constitution.

2. Because the court is equally divided on the question of whether the clergy criminal sexual conduct statute facially violates the Establishment Clause of the United States Constitution, we affirm the decision of the court of appeals that the statute is not facially unconstitutional.

3. In the trial of a charge under the clergy criminal sexual conduct statute, the admission of extensive evidence regarding religious doctrine and church policies and practices necessarily caused the entanglement of religion with the verdict and conviction, violating the Establishment Clause and necessitating a new trial.

Attorneys and Law Firms

Lori Swanson, Minnesota Attorney General, Saint Paul, MN, and Michael O. Freeman, Thomas A. Weist, Hennepin County Attorneys, Minneapolis, MN, for Respondent.

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Heard, considered, and decided by the court en banc.

OPINION

HANSON, Justice.

Appellant John Joseph Bussmann was convicted of two counts of third-degree criminal sexual conduct by a member of the clergy, in violation of Minn.Stat. § 609.344, subd. 1(*l*)(ii) (2006) (hereafter the "clergy sexual conduct statute"). The clergy sexual conduct statute makes it a crime for a member of the clergy to engage in sexual penetration with a person who is seeking or receiving "religious or spiritual advice, aid, or comfort in private." Bussmann argues that the clergy sexual conduct statute is unconstitutional because it is void for vagueness and it violates the Establishment Clause of the United States and Minnesota Constitutions. Because we (1) conclude that the clergy sexual conduct statute is not void for vagueness; (2) are equally divided on whether the statute facially violates the Establishment Clause; but (3)

conclude that Bussmann's conviction, based on the admission of extensive evidence concerning religious doctrine and church policies and practices, violated the Establishment Clause, we affirm the court of appeals' decision on the first two issues, reverse the court of appeals' decision on the third issue, and remand for a new trial.

Bussmann served as a Catholic priest at two churches, Saint Martin's in Rogers, Minnesota and Saint Walburga in Fletcher, Minnesota (the two churches were later consolidated into one, Mary Queen of Peace Church). While serving those churches, Bussmann began sexual relationships with two adult female parishioners, S.J. and D.I. Bussmann's sexual relationship with S.J. began in September 2002 and included sexual contact and penetration. Before and during their sexual relationship, Bussmann advised S.J. on religious and marital issues. Their relationship lasted until March 2003, when S.J. reported her relationship with Bussmann to the Archdiocese of Saint Paul and Minneapolis. Later, S.J. contacted the police.

In November 2002, Bussmann also began a sexual relationship with D.I., who he had been counseling through the grief resulting from her mother's death. Their relationship also involved sexual contact and penetration. On March 18, 2004, ***82** based on S.J.'s report to police, Bussmann was charged with third-degree criminal sexual conduct involving S.J. After learning of those charges, D.I. told her husband about her relationship with Bussmann and eventually reported the full extent of her sexual relationship with Bussmann to police.

The complaint against Bussmann was amended several times and eventually charged him with two counts of third-degree criminal sexual conduct based on his relationships with S.J. and D.I. Both charges were tried together. At trial, the state's first two witnesses were officials of the Archdiocese who testified extensively about the Catholic Church's practices and doctrines, including the religious basis for a priest's power in relationship to parishioners; the Church's definition of inappropriate counseling and pastoral care; the Church's concerns with the growing number of complaints of sexual misconduct by priests with adult parishioners; the procedures followed by the Church under canon law to investigate, prosecute, and adjudicate violations of the Church's rules regarding priestly behavior and priestly celibacy; and the Church's investigation of Bussmann, which led to the Decree of the Archdiocese that Bussmann had likely "engaged in behavior violative of his priestly authority and of his priestly celibacy."

D.I. and S.J. testified about their relationships with Bussmann. Bussmann's attorney stipulated to Bussmann's involvement with the two women, but argued that his relationships did not meet the prerequisites of the clergy sexual conduct statute.

Bussmann was convicted of both counts, sentenced to concurrent terms of imprisonment of 48 months and 68 months, and ordered to pay $2,500 in restitution. The court of appeals rejected Bussmann's claims that the clergy sexual conduct statute is void for vagueness or that it violates the Establishment Clause of the United States and Minnesota Constitutions. *State v. Bussmann,* No. A05–1782, 2006 WL 2673294, at *5 (Minn.App. Sept.19, 2006). As to the Establishment Clause claim, the court of appeals relied on its previous decision, that the clergy sexual conduct statute did not foster "excessive governmental entanglement with religion," in *Doe v. F.P.,* 667 N.W.2d 493, 500 (Minn.App.2003), *rev. denied* (Minn. Oct. 21, 2003). *Bussmann,* 2006 WL 2673294, at *5. In *F.P.,* the court of appeals concluded that the requirement that a court determine whether the "advice, aid, or comfort" provided by a member of the clergy in private was "religious or spiritual" did not foster excessive government entanglement with religion. 667 N.W.2d at 500. We granted review on the constitutional challenges to the statute.

[1] [2] [3] "Minnesota statutes are presumed to be constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty,* 448 N.W.2d 363, 364 (Minn.1989). Constitutional challenges are questions of law, which we review de novo. *In re Blilie,* 494 N.W.2d 877, 881 (Minn.1993).

I.

Bussmann argues that the clergy sexual conduct statute is unduly vague, in violation of due process. The relevant portions of the statute provide:

> [A] person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:
>
> * * * *

(*l*) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

* * * *

***83** (ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.

Minn.Stat. § 609.344, subd. 1(*l*)(ii) (2006).

[4] **[5]** The void-for-vagueness doctrine requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Bussmann argues that the clergy sexual conduct statute fails to give fair warning of what conduct is prohibited. Bussmann does not claim that the clergy provision is vague as applied to him, only that it might not give fair warning in other situations. But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' " *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)).

[6] **[7]** Bussmann next argues that the terms "ongoing" and "religious or spiritual advice, aid, or comfort" leave jurors free to decide what conduct is prohibited. In *Giaccio v. Pennsylvania*, the Supreme Court stated that a law fails to meet due process requirements if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." 382 U.S. 399, 402–03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). But due process requirements are satisfied "by specifying standards of conduct in terms that have acquired meaning involving reasonably definite standards either according to the common law or by long and general usage." *State v. Bolsinger,* 221 Minn. 154, 167, 21 N.W.2d 480, 489 (1946).

The term "ongoing" has a reasonably definite meaning in common usage, generally understood to be synonymous with the term "continuing." [1] In the context of the clergy sexual conduct statute, "ongoing" simply means that the clergy-counselee relationship that was established at a meeting continued for the period specified in the complaint. Whether a clergy-counselee relationship was established, whether an established clergy-counselee relationship actually continued, and whether the proscribed sexual conduct occurred during that ongoing clergy-counselee relationship are factual matters for the jury to decide and do not present vagueness concerns.

[8] **[9]** The term "religious or spiritual advice, aid, or comfort" has acquired a reasonably definite meaning from the use of the same term in the evidentiary clergy privilege statute. Minn.Stat. § 595.02, subd. 1(c) (2006) (stating that a member of the clergy shall not "be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice, aid, or comfort * * * without the consent of the person"). We have said that the term applies to requests for religious or spiritual aid that are made to clergy in their professional capacity. *E.g., State v. Black,* 291 N.W.2d 208, 216 (Minn.1980) (holding that request from inmate to county jail chaplain to pass information to co-conspirator ***84** was not privileged because the aid requested was not religious and because the request was not intended to be confidential). We have also noted that the "wording of the statute indicates that 'religious or spiritual' modifies 'advice, aid, or comfort,' not just 'advice.' " *Id.; see also Christensen v. Pestorious,* 189 Minn. 548, 552, 250 N.W. 363, 365 (1933) (stating that "[w]hile the pastor called upon the witness at the hospital prepared to give spiritual advice or comfort if the occasion required, it is beyond genuine controversy that none was asked"). [2]

Because the terms "ongoing" and "religious or spiritual advice, aid, or comfort" have acquired reasonably definite meanings, those terms provide a sufficiently fixed legal standard to determine what is prohibited. Accordingly, the clergy sexual conduct standard is not unduly vague and does not violate due process.

II.

We turn next to Bussmann's argument that the clergy sexual conduct statute facially violates the Establishment Clause. We are equally divided on this issue, but will discuss the two opposing views on facial invalidity.

A. The view that the statute facially violates the Establishment Clause.

The author of this opinion concludes that the clergy sexual conduct statute facially violates the Establishment Clause and should be stricken as unconstitutional. The discussion supporting this view is contained in this part A.

To begin the analysis of this issue, it is helpful to place the clergy sexual conduct statute in the context of the variety of third-degree criminal sexual conduct crimes described in Minn.Stat. § 609.344 (2006). That section criminalizes sexual penetration that occurs in various defined situations and, most significantly, removes consent as a defense to that penetration in many situations. [3]

***85** In this latter respect, section 609.344 is at odds with the general notion in criminal law that consenting adults have a protected right to engage in sexual contact. The United States Supreme Court has held that a state may not generally criminalize sexual contact between consenting adults in the privacy of their home. *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (holding that private sexual contact between consenting adults is a liberty right protected by the Due Process Clause of the Fourteenth Amendment). The Court implied that this general rule may not apply in cases where the consent is not legally effective, mentioning cases involving "minors," "persons who might be injured or coerced," or persons who are "situated in relationships where consent might not easily be refused." *See id.*

Before 1993, one exception created by the legislature, where a person's consent was not a defense to a sexual conduct crime, was in the psychotherapist-patient relationship. Minn.Stat. § 609.344, subd. 1(h)-(j) (1992). At that time, the statute's definition of psychotherapist included clergy: " 'Psychotherapist' means a physician, psychologist, nurse, chemical dependency counselor, social worker, *clergy,* marriage and family therapist, mental health service provider, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy." Minn.Stat. § 609.341, subd. 17 (1992) (emphasis added). The legislature defined "psychotherapy" as "the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition." Minn.Stat. § 609.341, subd. 18 (1992). The statute criminalized sexual penetration between a psychotherapist and patient during a psychotherapy session (section 609.344, subdivision 1(h)); sexual penetration that occurred with a "former patient [who] is emotionally dependent upon the psychotherapist" (section 609.344, subdivision 1(i)); and sexual penetration obtained by means of "therapeutic deception" (section 609.344, subdivision 1(j)).

In 1993, the legislature amended section 609.344, to expand the criminal liability of a psychotherapist to include sexual penetration that occurred between a psychotherapist and patient outside of a therapy session if an "ongoing psychotherapist-patient relationship exists" (subdivision 1(h)(ii)). Act of May 20, 1993, ch. 326, art. 4, §§ 18–20, 1993 Minn. Laws 1974, 2031–33. Simultaneously, the legislature amended section 609.341, subdivision 17, to remove "clergy" from the definition of "psychotherapist" and to create a separate crime of third-degree criminal sexual conduct exclusively for clergy. *Act, id.* The new clergy sexual conduct statute became section 609.344, subdivision 1(*l*).

After the 1993 amendments, there were significant differences between the elements of the offense of criminal sexual conduct for clergy compared to that for psychotherapists. Essentially, the psychotherapist provisions require proof of some causal connection between the position of the psychotherapist and the sexual conduct, either that the psychotherapist actively abused that position by "therapeutic ***86** deception" (section 609.344, subdivision 1(j)); the patient was unable to give effective consent because he or she suffered from a "mental or emotional illness, symptom, or condition" (section 609.344, subdivision 1(h), incorporating the definition of "psychotherapy" from section 609.341, subdivision 18); or the patient was "emotionally dependent on the psychotherapist" (section 609.344, subdivision 1(i)).

In contrast, the clergy sexual conduct statute does not require proof of any causal connection between the sexual conduct and the position of the clergy or the mental or emotional state of the parishioner. There is no requirement of proof that the clergy member was in a position to influence the parishioner; that the clergy member abused any such position; that the parishioner sought or received religious or spiritual advice because of any mental or emotional need; or that the parishioner's consent was influenced to any degree by the religious or spiritual advice that was given. Thus, unlike a psychotherapist-patient relationship, where the patient seeks counseling as treatment for a mental or emotional need, a parishioner may seek religious or spiritual advice out of intellectual curiosity without any mental or emotional need that could be seen as vulnerability.

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting

an establishment of religion." U.S. Const. amend. I. As interpreted, the clause forbids state action that (1) does not have a secular purpose; (2) advances or inhibits religion; or (3) fosters excessive government entanglement with religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). To avoid excessive government entanglement, "a state may not inquire into or review the internal decisionmaking or governance of a religious institution." *Odenthal v. Minn. Conference of Seventh–Day Adventists,* 649 N.W.2d 426, 435 (Minn.2002) (citing *Jones v. Wolf,* 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979)). Bussmann concedes that the statute neither advances nor inhibits religion. At issue, therefore, is whether the statute has a secular purpose or whether the statute causes excessive government entanglement with religion.

1. Secular Purpose

The plain language of the clergy sexual conduct statute suggests that the legislation had a secular purpose, even though it separates clergy from other counselors. Bussmann does not vigorously contest this conclusion. Rather, citing *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), he acknowledges that governmental regulation of religion generally survives the secular purpose inquiry.

When I review the legislative history of the 1993 amendments, I see that advocates for the amendments sought to build on the original intent of the legislature to prosecute clergy under the psychotherapist-patient statute, but to make it "more practical to apply." Hearing on H.F. 873, H. Subcomm. Crim. J. and Fam. L. (Jud.Comm.), Mar. 24, 1993 (audio tape) (comments of an Assistant Ramsey County Attorney). The amendment was sought to close a "loophole" in the definition of psychotherapy that allowed clergy members to claim that they were not engaged in secular counseling but rather were engaged in spiritual or religious counseling. Hearing on H.F. 873, H. Subcomm. Crim. J. and Fam. L. (Jud.Comm.), Mar. 24, 1993 (audio tape) (comments of the Executive Director, Walk–In Counseling Center, Minneapolis).

I would conclude that the legislature's intent was to protect Minnesota citizens ***87** from sexual exploitation, which is a secular purpose. The question then becomes whether the clergy sexual conduct statute accomplishes that purpose without fostering excessive government entanglement with religion.

2. Excessive Government Entanglement with Religion

I necessarily begin my analysis of this question with our decision in *Odenthal.* Although *Odenthal* focused on civil, not criminal, liability statutes, its analysis is quite useful in identifying the limitations that the Establishment Clause imposes on a state's ability to regulate religion, religious organizations, and religious activities. 649 N.W.2d at 434–41. To ensure that the standards applied for the civil liability of clergy were secular, not religious, we confined our consideration in *Odenthal* to the standards embodied in three statutes that were also applicable to counselors who were not clergy members, namely:

> statutes regarding unlicensed mental health practitioners, Minn.Stat. §§ 148B.60–.71 (1998); statutes setting forth licensure requirements for marital and family counselors, Minn.Stat. §§ 148B.29–.39 (1998); and statutes creating a cause of action for sexual exploitation by a psychotherapist, Minn.Stat. §§ 148A.01–.05 (2000).

Id. at 436.[4]

We concluded in *Odenthal* that clergy who provided mental health services equivalent to those provided by other mental health practitioners were subject to the statute; that the statutory definition of "mental health services" was neutral on its face—describing counseling in secular terms without regard to whether religious or spiritual principles are involved; and that, accordingly, the application of the statute to clergy would not impinge on the religious character of the relationship or excessively entangle the courts in religion. 649 N.W.2d at 437–38. We emphasized that

> the standards of conduct for those providing mental health services apply to all who meet the definition of unlicensed mental health practitioner, regardless of whether the relationship is one of clergy and church member. The statutory standards identified by Odenthal as establishing negligence, including protecting the health, safety and welfare of clients, the confidentiality of communications, and the impartiality of the mental

> health professional, do not suggest any unique or distinct application with respect to clergy.

Id. at 440.

Viewed in the context of *Odenthal,* the absence from the clergy sexual conduct statute of neutral or secular standards raises several concerns. Contrary to the statutes relied on in *Odenthal* to establish secular standards, the clergy sexual conduct statute criminalizes solely the conduct of clergy and prohibits sexual penetration solely when the counseling is "religious or spiritual" in nature. As argued by Bussmann, the statutes in *Odenthal* applied "in spite of [a person's] membership in the clergy," whereas the clergy sexual conduct statute applies "because of [a person's] membership in the clergy." In my view, the standards of the clergy sexual conduct ***88** statute are not "secular on their face," but instead proscribe conduct by expressly incorporating the religious aspect of the relationship and the religious content of the counseling.

I also conclude that the clergy sexual conduct statute establishes legislatively-determined facts that need not be proven at trial or decided by a jury. For example, the statute establishes the irrebuttable presumption that all clergy-advisee relationships have the same religious attributes—that is, that the clergy member is always in a position of power over an advisee; that such power is always embodied in the clergy member's role as a religious or spiritual advisor; that religious or spiritual advice always renders the advisee legally incapable of giving consent to sexual penetration; and that an advisee's consent to sexual penetration is always legally ineffective so long as the advisee is receiving religious or spiritual advice, aid, or comfort. If I am correct that these legislative determinations have established these facts as a matter of law, the only proof that would be required in a prosecution under the clergy sexual conduct statute is that the clergy member had sexual contact with an advisee at a time when the advisee was "meeting on an ongoing basis with [the clergy] to seek or receive religious or spiritual advice, aid, or comfort in private." Minn.Stat. § 609.344, subd. 1(*l*).

In this respect, the clergy sexual conduct statute stands in sharp contrast to the psychotherapist sexual conduct statute, which eliminates consent as a defense only where the state proves facts that render the consent legally ineffective. Thus, if the victim is a current patient, consent is not a defense for a psychotherapist if the state proves beyond a reasonable doubt that there is an "ongoing psychotherapist-patient relationship" (section 609.344, subdivision 1(h)(ii)), which requires proof that the patient is a person who suffers from a "mental or emotional illness, symptom, or condition" (section 609.341, subdivision 18). If the victim is a former patient, consent is not a defense for a psychotherapist if the state proves beyond a reasonable doubt that the patient is "emotionally dependent upon the psychotherapist" (section 609.344, subdivision 1(i)) or the "sexual penetration occurred by means of therapeutic deception" (section 609.344, subdivision 1(j)). Thus, under the psychotherapist [criminal] sexual conduct statute, the vulnerability of the victim is not presumed to exist, but must be proven by either the pre-existence of a mental or emotional condition or by the deceptive conduct of the psychotherapist. The presence of one or both of these facts is presumed to exist under the clergy sexual conduct statute.

In *Odenthal* we noted that the provider of mental health services was governed by a neutral, non-religious standard because the statute required proof that the person was providing assessment, treatment, or counseling for conditions that were specified in the statute, which did not require inquiry into any religious aspect of the counseling. 649 N.W.2d at 438. The conditions specified in the statute which defined the scope of "mental health services," were "a cognitive, behavioral, emotional, social, or mental condition, symptom, or dysfunction, including intrapersonal or interpersonal dysfunctions." *Id.* (citing Minn.Stat. § 148B.60, subd. 4 (1998)). These conditions provided a secular basis for determining that the consent of the victim was not legally effective. In my view, the clergy sexual conduct statute does not require proof of any such conditions.

The absence of secular standards, and the legislative determination that no consent could be legally effective, would mean that the statute is violated solely or primarily ***89** because of the religious identity of the actor or the religious nature of the relationship. For example, an unmarried clergy member who dated a parishioner and had sexual contact by mutual consent would be guilty of the crime if the two were also discussing spiritual and religious matters on an ongoing basis. Or, a parishioner who initiated and persistently pursued a sexual relationship with a member of the clergy would nevertheless be deemed to be incapable of effectively consenting to that relationship so long as the two discussed religious or spiritual issues, however disconnected with the sexual contact that discussion may have been. The absence of secular standards would support

the conclusion that the statute is the result of excessive government entanglement with religion.

Ultimately, I conclude that the standards of the clergy sexual conduct statute are not secular and neutral, but instead incorporate religious doctrine, as reflected in the legislative determinations that the clergy member is always in a position of power over an advisee, that any sexual penetration with an advisee is always causally related to the religious and spiritual advice given by the clergy member to an advisee, and that an advisee always lacks capacity to effectively consent to that sexual penetration. I believe that this absence of secular and neutral standards makes the statute unconstitutional on its face. [5]

I would therefore hold that section 609.344, subdivision (1)(*l*) fosters excessive government entanglement with religion, violates the Establishment Clause of the United States Constitution, and is unconstitutional.

B. The view that the statute does not facially violate the Establishment Clause.

Three Justices disagree with the conclusion stated in part A above and would hold that the clergy sexual conduct statute does not facially violate the Establishment Clause. The discussion of this view is contained in this part B and in the dissent of Chief Justice Russell Anderson.

In order for a court to find a statute facially invalid, it must conclude that the statute "could never be applied in a valid manner." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797–98, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). [6] For example, in *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the Supreme Court struck down as facially invalid a state law that prohibited peaceful display of a symbol of opposition to organized government. *Id.* at 369, 51 S.Ct. 532. The court held that such a statute "is so vague and indefinite as to ***90** permit the punishment of the fair use of [the opportunity for free political discussion]" and therefore "is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Id.* Similarly, in *Lovell v. Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), the Court struck down as facially invalid a local ordinance that required a license to distribute any literature and gave the chief of police the power to deny a license. 303 U.S. at 451–52, 58 S.Ct. 666. The Court held that the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451, 58 S.Ct. 666.

In *New York State Club Ass'n, Inc. v. City of New York,* however, the Supreme Court declined to find a law facially unconstitutional because plaintiffs could not establish that the law was unconstitutional in *all* of its applications. 487 U.S. 1, 11–14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (considering a facial challenge to the New York Human Rights Law, which forbade discrimination based on race and other factors). And in *Taxpayers for Vincent,* the Supreme Court considered a challenge to the constitutionality of a Los Angeles sign ordinance. Noting that the challenging party had not argued that the ordinance could never be validly applied, the Court characterized the attack on the ordinance as "a challenge to the ordinance as applied to [appellees'] activities" and limited its analysis to whether the ordinance was unconstitutional as applied. 466 U.S. at 802, 104 S.Ct. 2118. This court has also found laws unconstitutional as applied, but not facially. *See, e.g., State v. Grossman,* 636 N.W.2d 545, 551 (Minn.2001) (holding Minnesota's patterned sex offender sentence enhancement statute unconstitutional as applied to one defendant and noting our doubts as to whether the statute could ever be constitutionally applied); *McDonnell v. Comm'r of Pub. Safety,* 473 N.W.2d 848, 855 (Minn.1991) (holding a Minnesota statute that required police to advise drivers that they were not permitted to consult with an attorney prior to deciding whether to submit to or refuse blood alcohol content testing, and one that imposed criminal penalties on individuals who refused to submit to blood alcohol testing within five years of a prior driver's license revocation, unconstitutional as applied.).

Those who support this view conclude that the clergy sexual conduct statute is not unconstitutional on its face as a violation of the Establishment Clause because courts can determine whether a complainant sought or received religious or spiritual advice, aid, or comfort by reference to secular principles, not religious precepts. *See Jones v. Wolf,* 443 U.S. 595, 603–04, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979); *Odenthal v. Minn. Conference of Seventh–Day Adventists,* 649 N.W.2d 426, 435 (Minn.2002) ("There is no entanglement problem, however, when the dispute can be resolved according to 'neutral principles of law.' "). They observe that our courts already determine whether parties sought spiritual aid in the context of the clergy privilege. *See State v. Rhodes,* 627 N.W.2d 74, 85 (Minn.2001). They suggest that the state could have put on a case that did not make Bussmann's conviction hinge upon his violation of Catholic Church regulations, but

rather upon his act of penetration of a parishioner with whom he met on an ongoing basis to provide religious or spiritual advice, aid, or comfort. [7]

***91** The proponents of this view do not agree that the statute reflects legislative determinations that a clergy member is always in a position of power over a parishioner, that sexual contact with a parishioner is always causally related to religious and spiritual advice given by the clergy member, and that a parishioner always lacks capacity to effectively consent to the sexual conduct. They conclude that the statute reflects a legislative determination that a clergy member is in a position of power over a parishioner who seeks or receives religious or spiritual advice, aid, or comfort from the clergy member; that sexual penetration between such a parishioner and clergy member is so often causally related to the religious or spiritual advice, aid, or comfort that criminalizing all such contact is necessary to protect parishioners; and that such a parishioner so often lacks capacity to effectively consent to sexual penetration with the clergy member that criminalizing such contact is necessary to protect parishioners. They suggest that none of these determinations would be unreasonable, or represent governmental entanglement with religion. They conclude that a legislative determination that clergy members often exercise power over those to whom they provide religious or spiritual advice, aid, or comfort is based on a neutral, secular standard that does not implicate religious doctrine.

Those having this view acknowledge that the statute does not require the state to prove that the clergy member used his position or influence to take advantage of the mental or emotional state of the parishioner, but conclude that requiring courts to inquire into the power balance of particular clergy/parishioner relationships would create an entanglement problem. They conclude that it is for the legislature to determine whether the state must prove, in the context of a criminal prosecution, an imbalance of power between the victim and the defendant. *See* Minn.Stat. § 609.095(a) (2006) ("The legislature has the exclusive authority to define crimes and offenses and the range of the sentences or punishments for their violation.").

According to this view, a parishioner who wishes to engage in a sexual relationship with a clergy member can easily give effective consent for purposes of Minn.Stat. § 609.344, subd. 1(*l*); she need only stop meeting with the clergy member in private to seek or receive religious or spiritual advice, aid, or comfort. She could still meet with the clergy member in a group for these purposes, and could meet with him privately for any purpose whatsoever other than seeking religious or spiritual advice, aid, or comfort, without violating the statute.

Those with this view do not share the fear that a clergy member who dated and engaged in a mutually consensual sexual relationship with a parishioner would face prosecution if the two were also, as would seem likely, discussing spiritual or religious ***92** matters on an ongoing basis. Because, under the statute, religious or spiritual advice, aid, or comfort must be the primary purpose of the ongoing meetings, they would conclude that a clergy member who meets with a parishioner on an ongoing basis for any other purpose—social enrichment, personal edification, or even sexual gratification—does not violate the clergy sexual conduct statute. They recognize that it may be difficult to determine after the fact whether the parishioner met with the clergy member to seek or receive religious advice, but suggest that this would be no more difficult than determining whether a patient is emotionally dependent upon a psychotherapist, Minn.Stat. § 609.344, subd. 1(i), or whether sexual penetration was accomplished by "therapeutic deception," Minn.Stat. § 609.344, subd. 1(j).

Those sharing this view suggests that the harm targeted by the legislature in subdivision 1(*l*) and many other provisions of section 609.344 is not any particular vulnerability that an individual may have because of that individual's characteristics; instead, the harm targeted is the power imbalances that are likely to be present in these particular types of relationships. Thus, they would not read the statutory definition of psychotherapy in section 609.341, subdivision 18 ("the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition") as making the particular vulnerability that may be associated with mental and emotional illnesses an element of the psychotherapist-patient criminal sexual conduct offense. Instead, they would construe this language as defining a particular relationship that is being protected against the abuse of likely power imbalances. They conclude that this reading is bolstered by an amendment to the statute that criminalized all sexual conduct that occurs during an "ongoing psychotherapist-patient relationship," not just sexual conduct that occurs during an actual therapy session, with an emotionally-dependent former patient, or by means of therapeutic deception. Act of May 20, 1993, ch. 326, art. 4, § 20, 1993 Minn. Laws 1974, 2031–33.

Concluding that Bussmann has not demonstrated that all or even most applications of the clergy sexual conduct statute would foster excessive entanglement of government and religion, and that violations of the statute can be determined by secular principles of law, those sharing this view would hold that the clergy sexual conduct statute does not facially violate the Establishment Clause.

C. The effect of an equally divided court.

[10] Because we are equally divided on the issue of whether the clergy sexual conduct statute facially violates the Establishment Clause of the United States Constitution, we affirm the decision of the court of appeals that the statute does not facially violate the Establishment Clause.

III.

[11] Bussmann argues that the clergy sexual conduct statute is unconstitutional as applied in his trial. The state relied heavily on religious expert testimony to prove its case and the court allowed the jury to hear discussion that intertwined religious doctrine with state law. We do not criticize these witnesses. We understand their concern for the well-being of the victims and their commitment to seek accountability for offending clergy members. But we are concerned that the state's use of these witnesses engrafted religious standards onto the statute.

The state elicited testimony about Catholic Church doctrine concerning the power ***93** of priests over parishioners. The testimony described that power in religious terms:

> [T]he whole reason we're ordained is to exercise power in the name of the church. That power may be one of the most beautiful and fundamental, which is to change bread and wine into the body and blood of Christ. * * * It may be the power that comes from special access to people as pastors do when we assist people with death, with family crisis, with depression, with a variety of other issues. * * * What I train our clergy is that our long experiences of church is that that power, beautiful and important, central as it is to us, is also inherently dangerous because it can be misused for purposes other than what it's entrusted to us for.

The testimony also described the potential abuses of that power in religious terms, as "pastoring by seduction":

> [S]eduction means essentially any form of pastoring, the end of which is only to deepen the connection between the pastor and the person rather than to lead that person beyond the pastor to Jesus Christ. This would include sexual seduction, drawing people into one's self-pity and a variety of other violations of that fundamental relationship with Jesus.

The testimony described the concern of the Catholic Church with the increased number of complaints about sexual conduct arising out of the pastoral care relationship. These witnesses explained that the complaints of sexual exploitation of adult parishioners outnumbered those of minors. It described the Catholic Church's response, which includes training, public education, financial, emotional, and spiritual assistance to victims, and support for efforts to create civil and criminal remedies for violations. The testimony suggested that the Church's most important solution to the growing number of complaints was to name the perpetrator and to declare the conduct wrongful.

Finally, the testimony described the religious training that Bussmann had received and the complaints that had been made to the Church about Bussmann's behavior. Ironically, this testimony acknowledged that the Church does not regard itself as a mandatory reporter in cases of adult victims unless the victim is incompetent or otherwise vulnerable. Ultimately, the testimony described the determination by the Catholic Church that Bussmann had violated his priestly authority. In other words, the testimony was akin to victim impact testimony, which is only permitted to inform sentencing after a guilty verdict has been returned.

Virtually all of this testimony lacked foundation to connect it to any secular standard, was irrelevant to any secular standard, was inadmissible hearsay evidence, and was highly prejudicial. This testimony bolstered the state's claims by informing the jury that the Church condemned Bussmann's behavior and believed that it was important that he be held accountable. It provided religious standards by which the jury was to judge Bussmann's conduct. It provided a means by

which the Church was able to vouch for the credibility of the victims' testimony. It suggested to the jury that a conviction would be important to assist the Catholic Church in solving the problem of offending priests.

In *Odenthal* we suggested that the state's presentation of evidence concerning the standards of the church for pastoral care presents a serious risk of excessive government entanglement. 649 N.W.2d at 436. Odenthal had argued that the standard of care applicable to his civil negligent counseling claim against a clergy member could be drawn from the Seventh–Day ***94** Adventist Minister's Handbook. *Id.* We disagreed:

> As a statement of the church's policy regarding pastoral counseling, the Minister's Handbook poses a serious risk of religious entanglement for a court attempting to discern its limits * * *. Thus, Odenthal must state a cause of action in negligence by reference to neutral standards and not by reference to the Minister's Handbook.

Id.

[12] **[13]** **[14]** The Establishment Clause applies to the several states by virtue of the Fourteenth Amendment's Due Process Clause. *McCreary County v. ACLU of Ky.,* 545 U.S. 844, 853 n. 3, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005); *Cantwell v. Connecticut,* 310 U.S. 296, 303–04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). As the United States Supreme Court has interpreted the Fourteenth Amendment, official acts of state judicial officers are subject to the Due Process Clause. *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960) (stating that " '[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.' " (quoting *NAACP v. Alabama,* 357 U.S. 449, 463, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958))); *Shelley v. Kraemer,* 334 U.S. 1, 14, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) ("That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."). Thus, in order to comply with constitutional requirements, the official acts of state judicial officers must satisfy the three Establishment Clause requirements articulated by the Supreme Court in *Lemon v. Kurtzman:* (1) they must have a secular purpose; (2) they must have a principal effect that neither advances nor inhibits religion; and (3) they must not excessively entangle government and religion. 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Under Minnesota law, "conviction" means the acceptance and recording by the court of a plea, jury verdict, or court finding of guilt. Minn.Stat. § 609.02, subd. 5 (2006); *State v. Hoelzel,* 639 N.W.2d 605, 609 (Minn.2002). Thus, conviction necessarily involves an official act by the court and is therefore subject to the restraints imposed by the Fourteenth Amendment—including the requirements of the Establishment Clause.

As noted, the district court allowed the state to introduce extensive evidence regarding the Catholic Church's doctrine on the religious power of priests over parishioners; the Church's official policy on counseling and pastoral care; the Church's concerns about priest sexual misconduct; and the Church's official investigation and findings regarding Bussmann's behavior. Through the admission of this evidence, the court allowed the religious doctrine of the Catholic Church to become entangled with the criteria set out in the clergy sexual conduct statute for determining the criminality of Bussmann's conduct. The jury's verdict was based on this evidence, and was unavoidably entangled with the religious doctrine introduced into evidence by the state. [8]

***95** Further, we conclude that the error resulting from this entanglement was not harmless. Therefore, we hold that the appropriate remedy is to reverse Bussmann's convictions and remand this case to the district court for a new trial that does not entangle the court and religion. *See In re Welfare of M.P.Y.,* 630 N.W.2d 411, 418–19 (Minn.2001).

Affirmed in part, reversed in part, and remanded for a new trial.

PAGE, Justice.

I join in Parts I, II.A, and III of the opinion of Justice Hanson.

MEYER, Justice.

I join in Parts I, II.A, and III of the opinion of Justice Hanson.

ANDERSON, Paul H., Justice.

I join in Parts I, II.B, and III of the opinion of Justice Hanson.

ANDERSON, G. Barry, Justice.

I join in Parts I, II.B, and III of the opinion of Justice Hanson.

GILDEA, Justice, took no part in the consideration or decision of this case.

ANDERSON, PAUL H., Justice (concurring).

I join in Part I of the opinion of Justice Hanson. I also join, for the most part, in Part II.B of Justice Hanson's opinion. Finally, I agree with the holding in Part III of Justice Hanson's opinion that Bussmann's conviction, based on the evidence presented by the state at this particular trial, violated the First Amendment prohibition of "law[s] respecting an establishment of religion," as applied to the states through the Due Process Clause of the Fourteenth Amendment. Because this error was not harmless, I agree that the appropriate remedy is to reverse Bussmann's conviction and remand to the district court. I write separately, however, to clarify my view that the unconstitutional state action in this case was the district court's conviction of Bussmann following this particular trial, not the adoption of the statute by the legislature or the application of this statute to Bussmann's conduct.

I believe that the view articulated in Part II.A of Justice Hanson's opinion reads too much into the statute. The psychotherapist provision makes it a crime for a psychotherapist to engage in acts of sexual penetration with his patient during a psychotherapy session or when an ongoing psychotherapist-patient relationship exists. Minn.Stat. § 609.344, subd. 1(h). Similarly, the clergy provision makes it a crime for a member of the clergy to engage in acts of sexual penetration with a person to whom he is providing religious or spiritual advice, aid, or comfort during a private meeting for such purpose or when private meetings for such purpose are ongoing. Minn.Stat. § 609.344, subd. 1(*l*). Thus, both of these provisions require proof of the same two basic elements: (1) an act of sexual penetration; and (2) the existence of a specific relationship between the two parties.

Psychotherapy is defined as "the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition." Minn.Stat. § 609.341, subd. 18. The view articulated in Part II.A of Justice Hanson's opinion reads a "causal connection between the position of the psychotherapist and the sexual conduct" into this definition because the provision requires proof that the patient "suffered from a 'mental or emotional illness, symptom, or condition.' " But the criminal provision does not require proof that such a condition actually exists; rather, it only requires proof of meetings for the purpose ***96** of treating, assessing, or counseling about such a condition. Indeed, it is possible, following one or more assessment sessions, that no such condition would be diagnosed, yet any act of sexual penetration that occurred during an assessment session or during a period of ongoing assessment sessions would be illegal under the statute. Moreover, the statute does not criminalize all acts of sexual penetration involving individuals with a mental or emotional illness—it only criminalizes such conduct with the psychotherapist. Thus, as I read the statute, the harm targeted by the psychotherapist provision is not the inability of the patient to consent to sexual conduct because of a mental illness, but rather the potential for abuse that exists because of the power imbalance that often exists in the psychotherapist-patient relationship. Subdivision 1(*l*) makes the same policy determination with regard to clergy-parishioner relationships.

Based on my reading of section 609.344, subdivision 1(*l*), courts need not make any findings regarding the religious nature of a clergy-parishioner relationship; rather, the state need only prove ongoing private meetings for the purpose of "seek[ing] or receiv[ing] religious or spiritual advice, aid, or comfort." Such findings are already made in the context of the clergy evidentiary privilege, *see State v. Rhodes,* 627 N.W.2d 74, 85 (Minn.2001), and can be made by reference to secular rather than religious principles. This proof avoids any entanglement of the court with religion. Moreover, the record of this case does not suggest any unique circumstances that would require the state to introduce the entangling evidence of religious doctrine in order to prove that Bussmann's conduct violated section 609.344, subdivision 1(*l*). Thus, I would hold that Minn.Stat. § 609.344, subd. 1(*l*), is neither facially unconstitutional nor unconstitutional as applied to Bussmann's conduct. Instead, I would hold that Bussmann's conviction violated the Establishment Clause given the particular manner in which the state—based on the presentation of its case against Bussmann—invited the jury to base its verdict on religious principles rather than the secular, neutral criteria set forth in the statute.

ANDERSON, Chief Justice (dissenting).

I respectfully dissent, because I would affirm the conviction. I agree with the court's conclusion, stated in Part I of the majority opinion, that the clergy sexual misconduct statute is not unconstitutionally vague. [1] But I disagree with the court's conclusion and disposition, stated in Part III, that the statute is unconstitutional as applied in this case, warranting reversal of the conviction and remand for a new trial. Further, I disagree with the plurality conclusion stated in Part II.A that the statute is unconstitutional on its face. Although I agree with the conclusion stated in Part II.B that the statute is not unconstitutional on its face, I write separately to explain the reasons for my conclusion on that issue.

Facial Unconstitutionality

The clergy sexual misconduct statute does not entangle government in religion and therefore does not violate the Establishment Clause. The statute only contemplates application of neutral principles. None of the elements of the offense involve review of church doctrine. The statute is based on legislative judgments about the power imbalance inherent in the clergy-counseling relationship that negates true ***97** consent and does not incorporate church doctrine.

The First Amendment requires that civil courts abstain from resolving church disputes that would necessitate an adjudication of controversies over religious doctrine. *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708–09, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976) (stating that civil courts must defer to "the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 449–50, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) (holding that civil courts could not determine whether the general church departed from its doctrine).

But civil courts are not required to abstain from resolving church disputes if it can be accomplished by application of "neutral principles of law" that "free civil courts completely from entanglement in questions of religious doctrine, polity and practice." *Jones v. Wolf,* 443 U.S. 595, 602–04, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (noting that the neutral-principles-of-law method in a church property dispute relies "exclusively on objective, well-established concepts of trust and property law"). Civil courts may adopt a neutral-principles-of-law method for resolving church " 'disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' " *Id.* (quoting *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 368, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970)).

We used a neutral-principles approach in *Odenthal v. Minn. Conference of Seventh–Day Adventists,* 649 N.W.2d 426 (Minn.2002), a negligence action against a member of the clergy, alleging improprieties in marital counseling. The dispute in *Odenthal* centered on defining the appropriate standard of care. Defendant took the position that any standard of care necessitated assessments of religious components of the counseling relationship. *Id.* at 438. Plaintiff argued that several statutes, including one regulating defendant's conduct as an unlicensed mental health practitioner, could be applied without regard to religion. *Id.* at 436–37. We concluded that an adjudication of the negligence claim by application of neutral standards set forth in the statute regulating conduct as an unlicensed mental health practitioner did not violate the First Amendment. *Id.* at 441.

The neutral-principles approach, as employed by the Supreme Court, does not require civil courts to refrain from review of all church-based facts. For example, in settling church property disputes, civil courts can examine church documents such as property deeds, local church charters, and general church constitutions. *See Jones,* 443 U.S. at 603, 99 S.Ct. 3020. What the neutral-principles approach does require is that any examination of religious documents by civil courts be done "in purely secular terms" and that civil courts not "rely on religious precepts" in resolving disputes. *Id.* at 604, 99 S.Ct. 3020.

The clergy sexual misconduct statute at issue here does not address church disputes and involves only application of neutral principles. The core elements of the offense are: (1) sexual penetration by the actor; (2) the actor is a member of the clergy or purports to be; (3) the actor is not married to the complainant; and (4)(a) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or (b) the sexual penetration occurred during a period of time in which the ***98** complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Minn.Stat. § 609.344, subd. 1(*l*) (2006). [2] None of these elements involve an examination of doctrinal matters, pastoral qualifications, or tenets of faith

—only the nature of the meeting. The determination as to whether clergy advice is of a religious or spiritual nature is the same as that made for the evidentiary clergy privilege. *See, e.g., State v. Rhodes,* 627 N.W.2d 74, 85 (Minn.2001) (basing determination that communication was not privileged in part on finding that content of communication was not religious).

The plurality in Part II.A states that Minn.Stat. § 609.344, subd. 1(*l*), in eliminating consent as a defense, burdens only the clergy. But the statute also eliminates the consent defense for sexual relationships between physicians, psychologists, nurses, chemical dependency counselors, social workers, marriage and family therapists, mental health services providers, or other persons who provide psychotherapy; other physicians; government and private correctional employees; special transportation employees; and their respective patients or clients. *Id.,* subd. 1(h), (j), (k), (m), (n); Minn.Stat. § 609.341, subd. 17 (2006). The common ground in these relationships is the power imbalance between the parties. "Experts agree that sexual misconduct, as opposed to true consensual sex, occurs because there is a power differential." Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law,* 31 Fordham Urb. L.J. 549, 561 (2004).

The clergy-counselee relationship and secular counseling relationship reflect a similar power imbalance: "[p]eople seeking help, whether of a spiritual or secular nature, are likely to be vulnerable and dependent." Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 Denv. U.L.Rev. 1, 43 (1996). This power imbalance is aggravated by: "the counselee's initial vulnerability; the counselor's control of the environment; the confidentiality of the relationship; [and] the leverage gained from unilateral self-revelation." *Id.* at 46. The clergy sexual misconduct provision reflects legislative determinations about the disparity in power in the clergy-counselee relationship, during a period of ongoing counseling in private, that negates true consent. [3]

Certainly, not all clergy counselees and not all patients are vulnerable. Not all clergy and therapists are seen as all powerful. Nevertheless, "[t]he counselee typically pursues secular or religious counseling for marital difficulties, depression and suicidal tendencies, faith crises or uncertainty or coping skills in many facets of her life," and is therefore easily subject to exploitation. *Id.* at 46.

> ***99** This [power] differential is perhaps much more complex and certainly more powerful when it is between a trusted clergyman and a trusting congregant. Because of the role of the clergyman in the congregant's life, there can be no true consent to a sexual relationship, even when the victim is age appropriate.

Doyle & Rubino, *supra* at 561–62.

The underlying facts in this case illustrate the exploitation of this power imbalance. One of the complainants sought spiritual help related to family and faith issues. Her husband's employment as a sales representative entailed out-of-town travel. The other complainant sought help for severe depression following the illness and death of her mother. During their meetings, because Bussmann was their priest, they placed their trust in him and disclosed confidential information. When Bussmann first came to the church, he made a list of 20 women, 14 of whom he said later "hit" on him; and out of the 14, 12 were married. At the time of Bussmann's sexual relations with the complainants, he was having sexual relations with at least one other parishioner. Bussmann's sexual misconduct came to light when the first complainant's husband became suspicious, taped a phone conversation, confronted his wife and reported Bussmann to the Archdiocese. The second complainant was discovered during the criminal investigation related to the sexual misconduct with the first complainant. At sentencing, the complainants described their shame and pain. They talked about how their sexual relationships with Bussmann imperiled their marriages and damaged their faith. Instead of supporting the complainants and their families, their church community turned against them.

The plurality in Part II.A distinguishes the psychotherapist provision as eliminating the consent defense only if the state proves facts that render consent legally ineffective, either through proof of therapeutic deception or proof that the patient suffered from a mental dysfunction or was emotionally dependent. The core elements of the analogous psychotherapist provision are: (1) sexual penetration by the actor; (2) the actor is a psychotherapist; (3) the complainant is a patient of the psychotherapist; and (4) the sexual penetration occurred: (a) during the psychotherapy session; or (b) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists. Minn.Stat. §

609.344, subd. 1(h).[4] A patient is defined as a person who seeks or obtains psychotherapeutic services. Minn.Stat. § 609.341, subd. 16 (2006). Psychotherapy is the professional treatment, assessment, or counseling of an emotional illness, symptom, or condition. Minn.Stat. § 609.341, subd. 18 (2006). Accordingly, Minn.Stat. § 609.344, subd. 1(h) does not require proof of the patient's mental or emotional state, only the nature of the relationship: that psychotherapy was sought for treatment, or even just assessment, of a mental or emotional symptom. Thus, the stark distinction posited by the plurality does not exist. The therapeutic-deception and emotionally-dependent provisions identify separate circumstances of criminal activity.[5]

***100** The plurality suggests that criminal liability would attach for sexual relationships between unmarried clerics and parishioners who were incidentally engaged in discussing spiritual or religious matters. But the statute requires more: that sexual penetration "occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private." Minn.Stat. § 609.344, subd. 1(*l*)(ii). The statute contemplates situations in which a cleric provides professional assistance on an ongoing basis, in private, to someone in need.

The plurality in Part II.A. concludes that the clergy provision incorporates religious doctrine, as evidenced by legislative determinations about the power imbalance in all private clergy-counselee relationships that negates true consent. But this is no different than legislative determinations about the power imbalance in all private psychotherapist-counseling relationships, even for assessments of emotional symptoms, that negates true consent. There is no constitutional impediment to legislative review of the power imbalance in clergy-counseling relationships and the factors aggravating the imbalance. *Cf. Drevlow v. Lutheran Church, Mo. Synod,* 991 F.2d 468, 472 n. 3 (8th Cir.1993) (stating that "[w]hile the district court cannot constitutionally decide the validity of [religious] beliefs, * * * the court may properly determine their existence.") (internal citation omitted). It is for the legislature "to define by statute what acts constitute a crime. * * * [T]he role of the judiciary is limited to deciding whether a statute is constitutional, not whether it is wise or prudent legislation." *State v. Merrill,* 450 N.W.2d 318, 321 (Minn.1990) (internal citation omitted).

In summary, the clergy sexual misconduct statute is based on secular legislative determinations, not on church doctrine. The statute does not require examination of doctrinal matters. That the prosecution chose to present irrelevant church-doctrine evidence, which was completely unnecessary to prove liability as required by the statute, does not demonstrate that it is the statute that fosters the entanglement. I would hold that the clergy sexual misconduct statute does not implicate First Amendment entanglement concerns.

Unconstitutionality as Applied

In Part III of the plurality opinion, a majority of the court concludes that the statute is unconstitutional as applied in this case and reverses the conviction, remanding for a new trial. I cannot agree.

An "as applied" challenge argues that the statute is unconstitutional as applied to the individual's conduct. *See, e.g., Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 798, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (stating the "general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court"); *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (noting cases involving religious freedom in which the Court held that a statute was "unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights").

***101** But the court in Part III does not question the constitutionality of the statute as applied to Bussmann's conduct. Rather it is the state's presentation of church-doctrine evidence that is the driving force of the rationale stated and the disposition reached in Part III. The issue then would be whether the admission of that evidence violated Bussmann's Fourteenth Amendment due process right to a fair trial, not the constitutionality of the criminal statute as applied to Bussmann's conduct. The evidentiary issues, however, are not properly before us. Bussmann included the evidentiary issues in his petition for review. In granting review of the constitutional claims, we expressly declined review of the remaining issues. Consequently, those issues were neither briefed nor argued before us. Because we do not decide issues that are not properly before us, I would not base the resolution of this case on the evidentiary issues.

Furthermore, even if it were appropriate to review those evidentiary issues, they would not warrant reversal. Given that (1) the trial court provided limiting instructions to the jury, (2) the state and defense counsel made clear in closing

arguments that the jury's duty was to apply Minnesota law and not church law, and (3) the sole issue in dispute was the existence of an ongoing clergy-counselee relationship, in light of defense counsel's concessions in opening remarks that "Mr. Bussmann was a priest" and that he "had sexual relations" with two parishioners, I would hold that the evidentiary errors with which the court is concerned were harmless.

For these reasons I would affirm the conviction.

All Citations

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Footnotes

1 *E.g., United States v. Hensley,* 469 U.S. 221, 228, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (discussing application of a *Terry* stop in the context of ongoing crimes and completed crimes); *Kilcoyne v. State,* 344 N.W.2d 394, 397 (Minn.1984) (discussing ongoing sexual exploitation that continued for a period of time).

2 Bussmann also claims the clergy provision is overbroad, but he does not identify a constitutional defect. "[T]he overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment area, a challenge to a statute both on its face and as applied to the defendant." *State v. Machholz,* 574 N.W.2d 415, 419 (Minn.1998) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). Members of the clergy have neither a First Amendment nor a liberty interest in sexual activity gained through exploitation of the clergy-counselee relationship. *See, e.g., Reynolds v. United States,* 98 U.S. 145, 166–67, 25 L.Ed. 244 (1878) (holding that statute which prohibited polygamy did not violate First Amendment); *Talbert v. State,* No. CR 05–1279, 367 Ark. 262, —— S.W.3d ——, 2006 WL 2699903, at *4 (Sept. 21, 2006) (holding that member of clergy had no liberty interest to engage in sexual activity through abuse of his position of trust and authority).

3 Under Minn.Stat. § 609.344, consent is expressly eliminated as a defense where the complainant is under 13 years of age (subd. 1(a)); the complainant is between 13 and 16 years of age and the actor is more than 24 months older (subd. 1(b)); the complainant is between 16 and 18 years of age and the actor is more than 48 months older and in a position of authority (subd. 1(e)); the complainant is between 16 and 18 years of age and the actor has a significant relationship to the complainant (subd. 1(f) and (g)); the actor is a psychotherapist and sexual penetration with a patient occurred during a psychotherapy session or while an ongoing psychotherapist-patient relationship existed (subd. 1(h)); the actor is a psychotherapist, the complainant is or was a patient, and sexual penetration occurred by means of therapeutic deception (subd. 1(j)); the actor accomplishes sexual penetration by means of deception that the penetration is for a bona fide medical purpose (subd. 1(k)); the actor is a corrections worker and the complainant is under the supervision of a corrections facility (subd. 1(m)); and where the sexual penetration occurs during or immediately before or after the actor provides special transportation services to the complainant (subd. 1(n)). In three other situations, consent is not expressly eliminated as a defense but presumably would not be a viable defense, where: the actor uses force or coercion (subd. 1(c)); where the actor knows that the complainant is mentally impaired, mentally incapacitated, or physically helpless (subd. 1(d)); or where the actor is a psychotherapist and the complainant is a former patient who is emotionally dependent on the psychotherapist (subd. 1(i)).

4 One of those statutes, Chapter 148A, imposed civil liability standards for clergy, as psychotherapists, that were essentially parallel to the criminal liability standards that, prior to 1993, were applicable to clergy under the psychotherapist criminal sexual conduct statute. Thus a "psychotherapist" was defined for civil liability purposes to include a "member of the clergy" (section 148A.01, subdivision 5) and the statute prohibited certain sexual contact with a "patient or former patient" (section 148A.02).

5 Such a conclusion would not conflict with our decisions applying the evidentiary privilege to communications by a member of the clergy with "any person seeking religious or spiritual advice, aid, or comfort," under Minn.Stat. § 595.02, subd. 1(c) (2006). As described above, our concern with the clergy sexual conduct statute is not based on the prospect that courts will need to decide whether advice given by a clergy member is of a religious or spiritual nature. We have recognized that such a decision involves a narrow fact issue that courts can decide without excessive entanglement with religion. *See, e.g., State v. Rhodes,* 627 N.W.2d 74, 85–86 (Minn.2001) (affirming district court finding that communication was not protected by the clergy privilege because it was not religious or spiritual in nature); *State v. Black,* 291 N.W.2d 208, 216 (Minn.1980) (same).

6 The one exception to this rule, the overbreadth doctrine, permits a challenge to a law on the grounds that the law chills the speech of third parties. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). As this case does not involve free speech issues, the overbreadth exception is not relevant.

7 The model jury instructions for violations of section 609.344 explain the elements of criminal sexual conduct in the third degree:

> First, the defendant intentionally sexually penetrated ——.
>
> * * *
>
> Second, at the time of the sexual penetration, the defendant was or purported to be a member of the clergy.
>
> Third, at the time of the sexual penetration, the defendant was not married to ——.
>
> [1] Fourth, the sexual penetration occurred during the course of a meeting in which —— sought or received religious or spiritual advice or comfort from the defendant in private. Consent is not a defense to this charge.
>
> [2] Fourth, the sexual penetration occurred during a period of time in which —— was meeting on an on-going basis with the defendant to seek or receive religious or spiritual advice, aid, or comfort in private. Consent is not a defense to this charge.
>
> Fifth, the defendant's act took place on (or about) —— in —— County.

10 Minn. Dist. Judges Ass'n, Minnesota Practice—Jury Instruction Guides, Criminal, CRIMJIG 12.35 (5th ed.2006).

8 Although the official judicial act of conviction is the state action we focus on in this case, we also note that the district court's evidentiary rulings allowing the admission of this testimony may themselves have been sufficient state action to entangle the court with religion.

1 The opinion of Justice Hanson is the majority opinion because a majority of the court joins in Parts I and III and in the disposition announced in that opinion. Parts II.A and II.B are the opinions of two different pluralities.

2 Minn.Stat. § 609.344, subd. 1(*l*), criminalizes sexual conduct if:

> (*l*) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:
>
> (i) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or
>
> (ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense[.]

3 Hearing on H.F. 873, H. Comm.Crim. J. and Fam. L., Mar. 24, 1993 (audio tape) (comments of Assistant Ramsey County Attorney) (testifying the statute covered clergy "as recognizing this very intimate and personal relationship that had an inherent power differential so that abuse of that relationship should be criminalized").

4 Minn.Stat. § 609.344, subd. 1(h) criminalizes sexual conduct if:

> (h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred:
>
> (i) during the psychotherapy session; or
>
> (ii) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists.
>
> Consent by the complainant is not a defense[.]

5 Minn.Stat. § 609.344, subd. 1(a)-(n) identifies fourteen discrete circumstances of third-degree criminal sexual conduct. Subdivisions 1(i) and 1(j) describe separate circumstances of criminal conduct if a person engages in sexual penetration and

> (i) the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist;
>
> (j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense[.]

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670 N.W.2d 292
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
WOHLSOL, INC., Appellant.

No. A03-521.
|
Oct. 21, 2003.

After waiter served underage patron, corporation that operated bar was charged with misdemeanor offense of permitting underage persons to drink alcoholic beverages on its licensed premises. The Stevens County District Court, Gerald J. Seibel, J., certified question. The Court of Appeals, Stoneburner, J., held that statute required proof of knowledge by licensee of illegal sale of alcohol to minors.

Certified question answered.

West Headnotes (4)

[1] **Criminal Law**
Cases and questions reserved or certified

Questions whether statute making it a misdemeanor for a retail liquor licensee to permit an underage person to drink alcohol on the licensed premises required proof of knowledge of the alleged violation by the licensee, and whether the statute was unconstitutionally vague, were properly certified, where questions had not previously been addressed by appellate courts, and answers to questions would have statewide effect. M.S.A. § 340A.503, subd. 1(a)(1).

Cases that cite this headnote

[2] **Intoxicating Liquors**
Intent, knowledge, or good faith of seller

Statute making it a misdemeanor for a retail liquor licensee to permit an underage person to drink alcohol on the licensed premises required proof of knowledge of the alleged violation by the licensee such that the licensee authorized, tolerated, or ratified sale of intoxicating liquor to minors before the licensee could be found criminally liable under the statute. M.S.A. § 340A.503, subd. 1(a)(1).

Cases that cite this headnote

[3] **Corporations and Business Organizations**
Acts or omissions of officers and agents

Criminal liability for acts of a corporation's servants, in which the corporation in no way participated, is vicarious liability.

Cases that cite this headnote

[4] **Corporations and Business Organizations**
Acts or omissions of officers and agents

A corporation may be guilty of a specific-intent crime if it can be shown that (1) the agent was acting within the course and scope of employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally, (2) the agent was acting, at least in part, in furtherance of the corporation's business interests, and (3) the criminal acts were authorized, tolerated, or ratified by the corporate management.

Cases that cite this headnote

293** ***Syllabus by the Court

1. A conviction under Minn.Stat. § 340A.503, subd. 1(a)(1) (1998), making it a misdemeanor crime for a retail liquor licensee to permit any person under the age of 21 years to drink alcoholic beverages on the licensed premises, requires proof beyond a reasonable doubt that the licensee had knowledge of, authorized, tolerated, or ratified the alleged violation.

2. Because the words "to permit" in Minn.Stat. § 340A.503, subd. 1(a)(1) require proof of knowledge, authorization, toleration, or ratification of an alleged violation, the statute is not unconstitutionally vague.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Charles C. Glasrud, Morris City Attorney, Morris, MN, for respondent.

Robert V. Dalager, Fluegel, Helseth, McLaughlin, Anderson & Brutlag, Chtd., Morris, MN, for appellant.

Considered and decided by WILLIS, Presiding Judge, TOUSSAINT, Chief Judge, and STONEBURNER, Judge.

OPINION

STONEBURNER, Judge.

Appellant Wohlsol, Inc., a Minnesota corporation, is charged with two misdemeanor counts of permitting underage persons to drink alcoholic beverages on its licensed premises in violation of Minn.Stat. § 340A.503, subd. 1(a)(1) (1998). Prior to trial, appellant moved to dismiss the charges, claiming that the statute is unconstitutionally vague. Appellant also renewed an objection to the district court's proposed jury instructions, which did not require the state to prove that appellant had knowledge of the violation or specific intent. The district court denied the motion to dismiss but granted appellant's request that the jury be instructed that the state is required to prove that appellant acted with knowledge of the alleged violation of Minn.Stat. § 340A.503, subd. 1(a)(1). The district court certified as important and doubtful the questions of (1) whether Minn.Stat. § 340A.503, subd. 1(a)(1), as it relates to whether the appellant "permitted" an underage person to drink alcohol on the licensed premises, requires proof by the state that appellant acted with knowledge of the alleged statutory violation and (2) whether Minn.Stat. § 340A.503, subd. 1(a)(1), is unconstitutionally vague with respect to the term "permit." We answer the first certified question in the affirmative and the second certified question in the negative.

FACTS

Appellant Wohlsol, Inc., a closely held Minnesota corporation, is an on-sale intoxicating-liquor licensee operating licensed premises known as Old No. 1 Bar & Grill in Morris. In January 2002, a waiter at the bar served alcoholic beverages to two 20-year-old patrons without asking either of them to produce identification. One of the patrons consumed about five beers on the premises and was later involved in a fatal car accident. The parties have stipulated that appellant

> asserts, and the State has no evidence to dispute, that it had not authorized or directed [the waiter] to sell, serve, or allow or permit consumption of alcoholic beverages by underage persons in the bar, and in fact, asserts that it had specifically trained and instructed its employees, including [the waiter], not to do so, on many occasions.

***294** Appellant was charged with two misdemeanor counts of permitting an underage person to drink on licensed premises under Minn.Stat. § 340A.503, subd. 1(a)(1) (1998). Appellant moved to dismiss the charges, asserting that application of Minn.Stat. § 340A.503, subd. 1(a)(1), unconstitutionally violates due process by imposing vicarious criminal liability on appellant based solely on the actions of an employee. The district court denied the motion. The district court also denied appellant's request to instruct the jury that the corporation may only be guilty if the employee's actions were authorized, tolerated, or ratified by appellant's corporate management. Immediately prior to jury selection, appellant moved to dismiss the charges on the ground that Minn.Stat. § 340A.503, subd. 1(a)(1), is unconstitutionally vague. Appellant also renewed its objection to the district court's denial of its request that the jury be instructed that the state must prove appellant's knowledge or specific intent to violate the statute. The district court denied appellant's motion to dismiss but granted the requested instruction that the state is required to prove that appellant acted with knowledge of the alleged violation of the statute. The district court then certified the following questions to the court of appeals:

1. Does Minn.Stat. § 340A.503, subd. 1(a)(1), as it relates to whether the defendant "permitted" an underage person to drink alcohol upon the licensed premises, require proof by the Plaintiff that Defendant acted with knowledge of the alleged violation of the statute?

2. Is Minn.Stat. § 340A.503, subd. 1(a)(1) unconstitutionally vague with respect to the term "permit."

ISSUES

1. Is Minn.Stat. § 340A.503, subd. 1(a)(1) (1998), making it a misdemeanor for a retail liquor licensee to permit an underage person to drink alcohol on the licensed premises, a specific intent statute requiring the state to prove that a defendant acted with knowledge of the alleged violation?

2. Is Minn.Stat. § 340A.503, subd. 1(a)(1) unconstitutionally vague because it is unclear whether the term "permit" requires proof of specific intent?

ANALYSIS

[1] "This court accepts certification of questions regarding criminal statutes as important and doubtful when the challenged statute has statewide application and the question has not previously been decided." *State v. Mireles,* 619 N.W.2d 558, 561 (Minn.App.2000) (citing *State v. Nodes,* 538 N.W.2d 158, 160 (Minn.App.1995)). The questions of whether Minn.Stat. § 340A.503, subd. 1(a)(1) (1998), requires proof of knowledge of the alleged violation by the licensee, and whether the statute is unconstitutionally vague have not previously been addressed by Minnesota appellate courts. Answers to these questions would have statewide effect. Therefore, the questions were properly certified.

The material facts are not in dispute, and resolution of these issues involves interpretation of the statute and caselaw. The standard of review is, therefore, de novo. *State v. Murphy,* 545 N.W.2d 909, 914 (Minn.1996) (stating whether a statute has been properly construed is a question of law subject to de novo review); *State v. Wright,* 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999) (stating constitutionality of statute presents question of law reviewed de novo).

1. Is Minn.Stat. § 340A.503, subd. 1(a)(1), a specific intent statute that requires proof that a defendant had knowledge of an alleged violation?

***295** **[2]** Minn.Stat. § 340A.503, subd. 1(a)(1), provides that it is unlawful for any "[r]etail intoxicating liquor or 3.2 percent malt liquor licensee, municipal liquor store, or bottle club permit holder under section 340A.414, to permit any person under the age of 21 years to drink alcoholic beverages on the licensed premises or within the municipal liquor store [.]" Appellant argues that the term "permit," as used in the statute, must incorporate a requirement of proof of knowledge or specific intent on the part of a defendant, otherwise a licensee will be unconstitutionally held vicariously criminally liable for the acts of its employees. *See State v. Guminga,* 395 N.W.2d 344, 349 (Minn.1986) (holding vicarious liability imposed on employers whose employees served alcohol to minors violates substantive due process provision of Minnesota Constitution).

The current statute, Minn.Stat. § 340A.503, subd. 1(a)(1), was enacted after *Guminga* held unconstitutional the vicarious liability provisions of its predecessor, Minn.Stat. § 340.941 (1986). The state argues that the current statute does not impose vicarious liability and, because the legislature did not modify the term "permit" in the current statute with "intentionally," "knowingly," or "willfully," it is logical to assume that no such requirement is implied. *See* Minn.Stat. § 609.02, subd. 9(1) (1998) (stating that when criminal intent is element of section 609 crime, "such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe' "). The state asserts that when the legislature criminalizes an act without mention of a required intent level, it creates a general-intent crime. *See State v. Orsello,* 554 N.W.2d 70, 73 (Minn.1996).

The state argues that the legislature intended to create a special category of crime for the licensee, which usually is not directly involved in the furnishing of alcoholic beverages, and that to read an element of intent or knowledge into the statute would render the statute absurd and of no effect. But this argument encourages a reading of the statute that eliminates any intent requirement. Such a reading would render the statute unconstitutional under *Guminga.* 395 N.W.2d at 349 (holding predecessor statute unconstitutional specifically because of vicarious-liability provision's elimination of intent requirement). This court will avoid, if possible, any interpretation of a statute that renders it unconstitutional. *Orsello,* 554 N.W.2d at 74; *see also* Minn.Stat. § 645.17(3) (1998).

The state relies on *State v. Loge*, arguing that the supreme court there held that the state is not required to prove knowledge to establish the criminal liability of a driver who keeps or allows to be kept in a motor vehicle any open bottle or receptacle containing intoxicating liquor when the vehicle is on a public highway, in violation of Minn.Stat. § 169.122, subd. 3 (1998). 608 N.W.2d 152, 158-59 (Minn.2000). But the state's assertion that the supreme court in *Loge* held that "allowing" an open bottle in a vehicle does not require proof of knowledge or intent is incorrect. In *Loge*, the supreme court specifically limited its opinion to an analysis of "to

keep" based on the facts of that case, and did not analyze the alternative manner of violation not presented in that case of "allowing to be kept." *Id.* at 155. Noting that the legislature had used the term "knowingly keeps" in a separate subdivision imposing criminal liability for the presence of marijuana in a vehicle, the supreme court said that the distinction "indicates that the legislature does not perceive the word 'keep' alone to imply or contain a knowledge element." *Id.* at 157. Because the court did not reach the issue of whether knowledge is required to prove a violation for "allowing" ***296** an open bottle, the case is not helpful in determining whether the term "permit" used in Minn.Stat. § 340A.503, subd. 1(a)(1) incorporates a knowledge requirement. [1]

Appellant relies on a more analogous, but significantly older, supreme court decision, reversing a finding that a pharmacist was liable for penalties under an 1885 statute providing that:

> Any registered pharmacist or other person who shall permit the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his store or place of business, except under the supervision of a registered pharmacist, or by a registered assistant ... shall ... be liable to a penalty of fifty dollars.

State v. Robinson, 55 Minn. 169, 170, 56 N.W. 594, 594 (1893) (citing Gen. Laws 1885, c. 147 as amended by Gen. Laws 1891, c. 104). The illegal sales were made by an employee of a drug-store owner during the owner's absence and without the owner's knowledge or authorization. *Id.* at 171, 56 N.W. at 594. Addressing the claim that the store owner permitted the sales within the meaning of the section because "the owner of a drug store permits on the part of his employes (sic) what he does not prevent," the supreme court stated:

> As always used, the word "permit" includes the element of assent. When used in a statute to describe an action made penal it must be held to include that element, unless there be something in the context clearly indicating the contrary.... It would be hard upon the owners of such stores to make them liable penally for the acts of [persons employed who are not registered pharmacists] done without [the owners'] knowledge, and contrary to their instructions. There is nothing in the statute showing an intent to go so far as that.

Id.

Minn.Stat. § 340A.503, subd. 1(a)(1), was enacted after the supreme court held that the predecessor statute, Minn.Stat. § 340.73 (1984), violated the substantive due process provision of the state constitution by imposing vicarious criminal liability on an employer for an employee's sale of intoxicating liquor to minors. Appellant argues that unless there is a knowledge or assent requirement for a licensee to violate § 340A.503, subd. 1(a)(1), the statute unconstitutionally imposes vicarious liability on the licensee for the acts of an employee. The state argues that since appellant is a corporation, and as such not subject to imprisonment, the reasoning in *Guminga,* which held that in Minnesota "no one can be convicted of a crime punishable by imprisonment for an act he did not commit, did not have knowledge of, or give expressed or implied consent to the commission thereof," is not applicable. *Guminga,* 395 N.W.2d at 349. But the statute is not limited in application to corporations. And there is nothing in the statute to suggest that the level of intent implied by the statute is different for individual and corporate retail liquor licensees.

***297** **[3]** **[4]** There is no question that corporations may be held liable for crimes. *See, e.g., City of Duluth v. City Mkt. Co.,* 187 Minn. 149, 244 N.W. 552 (1932); *State v. People's Ice Co.,* 124 Minn. 307, 144 N.W. 962 (1914). But criminal liability for acts of its servants, in which the corporation in no way participated, is vicarious liability. *Pettit Grain & Potato Co. v. N. Pac. Ry. Co.,* 227 Minn. 225, 239, 35 N.W.2d 127, 135 (1948). A corporation may be guilty of a specific-intent crime if it can be shown that (a) the agent was acting within the course and scope of employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally; (b) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (c) the criminal acts were authorized, tolerated, or ratified by the corporate management. *State v. Christy Pontiac-GMC, Inc.,* 354 N.W.2d 17, 20 (Minn.1984). What must be shown is that from all of the facts and circumstances, those in position of managerial authority or responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy. *Id.* We conclude that the meaning of the word "permit" as used in Minn.Stat. § 340A.503, subd. 1(a)(1), is clear and requires an element of

knowledge of the violation such that the licensee authorized, tolerated or ratified sale of intoxicating liquor to minors before the licensee may be found criminally liable under the statute. Because the statute is unambiguous, we do not address appellant's argument on the "rule of lenity," which requires that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity towards the defendant. *Orsello,* 554 N.W.2d at 74 (citations omitted).

2. Is Minn.Stat. § 340A.503, subd. 1(a)(1) unconstitutionally vague?

Because we have found that the word "permit" as used in the statute unambiguously requires an element of knowledge of the violation as described above, we hold that the statute is not unconstitutionally vague.

DECISION

Minn.Stat. § 340A.503, subd. 1(a)(1) (1998), requires the state to prove that a licensee had knowledge of, authorized, tolerated, or ratified, an alleged violation before the licensee may be convicted of violating the statute. Minn.Stat. § 340A.503, subd. 1(a)(1), is not unconstitutionally vague.

Affirmed; first certified question answered in the affirmative; second certified question answered in the negative.

All Citations

670 N.W.2d 292

Footnotes

1 The supreme court in *Loge* specifically noted that a driver has "the opportunity and [is] in the best position to find out the fact of the open bottle's presence 'with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.' " 608 N.W.2d at 158 (citation omitted). There is a clear distinction between the opportunity of such a driver to discover and prevent an open bottle violation and the opportunity of liquor licensee who is not present on the premises when a minor is served to discover and prevent violation of Minn.Stat. § 340A.503, subd. 1(a)(1).

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354 N.W.2d 17
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
CHRISTY PONTIAC–GMC, INC., Appellant.

Nos. C1–82–1209, C0–83–689.
|
Aug. 31, 1984.

Corporate defendant was convicted in the District Court, Ramsey County, Otis Godfrey, J., of theft and forgery, and it appealed. The Supreme Court, Simonett, J., held that evidence, which indicated that corporate employee with middle management responsibilities forged cash rebate applications, that corporation got the rebate money and that management authorized, tolerated or ratified employee's actions, established that the theft by swindle and forgeries constituted acts of the corporation and therefore evidence was sufficient to sustain corporation's convictions for theft and forgery.

Affirmed.

West Headnotes (3)

[1] Corporations and Business Organizations
Acts or omissions constituting offenses

A corporation may be prosecuted and convicted for crimes of theft and forgery, which requires specific intent. M.S.A. §§ 609.01, subd. 1, 609.02, subd. 1, 609.055, 609.52, subd. 2, 609.625, 609.625, subd. 1, 645.44, subd. 7.

3 Cases that cite this headnote

[2] Corporations and Business Organizations
Acts or omissions of officers and agents

For a corporation to be guilty of a specific intent crime, it must be shown that its agent was acting within course and scope of his employment, having the authority to act for the corporation with respect to the particular corporate business which was being conducted criminally, agent was acting, at least in part, in furtherance of corporation's business interests and the criminal acts were authorized, tolerated, or ratified by corporate management.

6 Cases that cite this headnote

[3] Forgery
Weight and Sufficiency of Evidence

Larceny
Weight and Sufficiency

Evidence, which indicated that corporate employee with middle management responsibilities forged cash rebate applications, that corporation got the rebate money and that management authorized, tolerated or ratified employee's actions, established that the theft by swindle and forgeries constituted acts of the corporation and therefore evidence was sufficient to sustain corporation's convictions for theft and forgery.

1 Cases that cite this headnote

17** ***Syllabus by the Court

1. A corporation may be prosecuted and convicted for the crimes of theft and forgery.

2. For a corporation to be guilty of a specific intent crime, it must be shown that (1) its agent was acting within the course and scope of his employment, having the authority to act for the corporation with respect to the particular corporate business which was being conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.

3. The evidence is sufficient to sustain the conviction of the defendant corporation.

Attorneys and Law Firms

Jack S. Nordby, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., Thomas J. Foley, County Atty., Steven C. DeCoster, Asst. County Atty., St. Paul, for respondent.

Considered and decided by the court en banc without oral argument.

Opinion

SIMONETT, Justice.

We hold that a corporation may be convicted of theft and forgery, which are ***18** crimes requiring specific intent, and that the evidence sustains defendant corporation's guilt.

In a bench trial, defendant-appellant Christy Pontiac-GMC, Inc., was found guilty of two counts of theft by swindle and two counts of aggravated forgery, and was sentenced to a $1,000 fine on each of the two forgery convictions. Defendant argues that as a corporation it cannot, under our state statutes, be prosecuted or convicted for theft or forgery and that, in any event, the evidence fails to establish that the acts complained of were the acts of the defendant corporation.

Christy Pontiac is a Minnesota corporation, doing business as a car dealership. It is owned by James Christy, a sole stockholder, who serves also as president and as director. In the spring of 1981, General Motors offered a cash rebate program for its dealers. A customer who purchased a new car delivered during the rebate period was entitled to a cash rebate, part paid by GM and part paid by the dealership. GM would pay the entire rebate initially and later charge back, against the dealer, the dealer's portion of the rebate. Apparently it was not uncommon for the dealer to give the customer the dealer's portion of the rebate in the form of a discount on the purchase price.

At this time Phil Hesli was employed by Christy Pontiac as a salesman and fleet manager. On March 27, 1981, James Linden took delivery of a new Grand Prix for his employer, Snyder Brothers. Although the rebate period on this car had expired on March 19, the salesman told Linden that he would still try to get the $700 rebate for Linden. Later, Linden was told by a Christy Pontiac employee that GM had denied the rebate. Subsequently, it was discovered that Hesli had forged Linden's signature twice on the rebate application form submitted by Christy Pontiac to GM, and that the transaction date had been altered and backdated to March 19 on the buyer's order form. Hesli signed the order form as "Sales Manager or Officer of the Company."

On April 6, 1981, Ronald Gores purchased a new Le Mans, taking delivery the next day. The rebate period for this model car had expired on April 4, and apparently Gores was told he would not be eligible for a rebate. Subsequently, it was discovered that Christy Pontiac had submitted a $500 cash rebate application to GM and that Gores' signature had been forged twice by Hesli on the application. It was also discovered that the purchase order form had been backdated to April 3. This order form was signed by Gary Swandy, an officer of Christy Pontiac.

Both purchasers learned of the forged rebate applications when they received a copy of the application in the mail from Christy Pontiac. Both purchasers complained to James Christy, and in both instances the conversations ended in angry mutual recriminations. Christy did tell Gores that the rebate on his car was "a mistake" and offered half the rebate to "call it even." After the Attorney General's office made an inquiry, Christy Pontiac contacted GM and arranged for cancellation of the Gores rebate that had been allowed to Christy Pontiac. Subsequent investigation disclosed that of 50 rebate transactions, only the Linden and Gores sales involved irregularities.

In a separate trial, Phil Hesli was acquitted of three felony charges but found guilty on the count of theft for the Gores transaction and was given a misdemeanor disposition. An indictment against James Christy for theft by swindle was dismissed, as was a subsequent complaint for the same charge, for lack of probable cause. Christy Pontiac, the corporation, was also indicted, and the appeal here is from the four convictions on those indictments. Before trial, Mr. Christy was granted immunity and was then called as a prosecution witness. Phil Hesli did not testify at the corporation's trial.

I.

[1] Christy Pontiac argues on several grounds that a corporation cannot be held criminally liable for a specific intent crime. ***19** Minn.Stat. § 609.52, subd. 2 (1982), says "whoever" swindles by artifice, trick or other means commits theft. Minn.Stat. § 609.625, subd. 1 (1982), says

"whoever" falsely makes or alters a writing with intent to defraud, commits aggravated forgery. Christy Pontiac agrees that the term "whoever" refers to persons, and it agrees that the term "persons" *may* include corporations, *see* Minn.Stat. § 645.44, subd. 7 (1982), but it argues that when the word "persons" is used here, it should be construed to mean only natural persons. This should be so, argues defendant, because the legislature has defined a crime as "conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment, with or without a fine," Minn.Stat. § 609.02, subd. 1 (1982), and a corporation cannot be imprisoned. Neither, argues defendant, can an artificial person entertain a mental state, let alone have the specific intent required for theft or forgery.

We are not persuaded by these arguments. The Criminal Code is to "be construed according to the fair import of its terms, to promote justice, and to effect its purposes." Minn.Stat. § 609.01, subd. 1 (1982). The legislature has not expressly excluded corporations from criminal liability and, therefore, we take its intent to be that corporations are to be considered persons within the meaning of the Code in the absence of any clear indication to the contrary. *See, e.g.,* Minn.Stat. § 609.055 (1982) (legislative declaration that children under the age of 14 years are incapable of committing a crime). We do not think the statutory definition of a crime was meant to exclude corporate criminal liability; rather, we construe that definition to mean conduct which is prohibited and, if committed, *may* result in imprisonment. Interestingly, the specific statutes under which the defendant corporation was convicted, sections 609.52 (theft) and 609.625 (aggravated forgery), expressly state that the sentence may be either imprisonment *or* a fine.

Nor are we troubled by any anthropomorphic implications in assigning specific intent to a corporation for theft or forgery. There was a time when the law, in its logic, declared that a legal fiction could not be a person for purposes of criminal liability, at least with respect to offenses involving specific intent, but that time is gone. If a corporation can be liable in civil tort for both actual and punitive damages for libel, assault and battery, or fraud, it would seem it may also be criminally liable for conduct requiring specific intent. Most courts today recognize that corporations may be guilty of specific intent crimes. *See, e.g., Commonwealth v. Beneficial Finance Co.,* 360 Mass. 188, 275 N.E.2d 33 (1971), and cases collected therein; *State v. Graziani,* 60 N.J.Super. 1, 158 A.2d 375 (1959) (car dealership selling used cars as new convicted of obtaining money from customers under false pretenses), *aff'd,* 31 N.J. 538, 158 A.2d 330, *cert. denied,* 363 U.S. 830, 80 S.Ct. 1601, 4 L.Ed.2d 1524 (1960). *See also,* Brickley, *Corporate Criminal Accountability,* 60 Wash.U.L.Q. 393 (1982); Annot., *Criminal Liability of Corporations for Bribery or Conspiracy to Bribe Public Official,* 52 A.L.R.3d 1274 (1973). Particularly apt candidates for corporate criminality are types of crime, like theft by swindle and forgery, which often occur in a business setting.

We hold, therefore, that a corporation may be prosecuted and convicted for the crimes of theft and forgery.

II.

[2] There remains, however, the evidentiary basis on which criminal responsibility of a corporation is to be determined. Criminal liability, especially for more serious crimes, is thought of as a matter of personal, not vicarious, guilt. One should not be convicted for something one does not do. In what sense, then, does a corporation "do" something for which it can be convicted of a crime? The case law, as illustrated by the authorities above cited, takes differing approaches. If a corporation is to be criminally liable, it is clear that the crime must not be a personal aberration of an employee acting on his own; the criminal ***20** activity must, in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation. There must be, as Judge Learned Hand put it, a "kinship of the act to the powers of the officials, who commit it." *United States v. Nearing,* 252 F. 223, 231 (S.D.N.Y.1918).

We believe, first of all, the jury should be told that it must be satisfied beyond a reasonable doubt that the acts of the individual agent constitute the acts of the corporation. Secondly, as to the kind of proof required, we hold that a corporation may be guilty of a specific intent crime committed by its agent if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.

This test is not quite the same as the test for corporate vicarious liability for a civil tort of an agent. The burden of proof is different, and, unlike civil liability, criminal

guilt requires that the agent be acting at least in part in furtherance of the corporation's business interests. *Compare Marston v. Minneapolis Clinic of Psychiatry,* 329 N.W.2d 306 (Minn.1983) (civil vicarious liability). Moreover, it must be shown that corporate management authorized, tolerated, or ratified the criminal activity. Ordinarily, this will be shown by circumstantial evidence, for it is not to be expected that management authorization of illegality would be expressly or openly stated. Indeed, there may be instances where the corporation is criminally liable even though the criminal activity has been expressly forbidden. What must be shown is that from all the facts and circumstances, those in positions of managerial authority or responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy, and it can be said, therefore, that the criminal act was authorized or tolerated or ratified by the corporation.

Christy Pontiac argues that it cannot be convicted of aiding the very actor whose acts are deemed its own acts; in other words, it argues that it cannot aid itself. Perhaps because it was uncertain of the legal rationale for corporate criminal liability, the state, in each of the four counts of the indictment, alleged that Christy Pontiac "then and there being aided and abetted by another and aiding and abetting another" did commit the crime. We construe the indictment, however, to allege alternatively that Christy Pontiac committed the crimes as a principal or as an aider and abetter. The trial court, without objection, considered the corporation to be prosecuted and convicted as a principal, as do we.

III.

[3] This brings us, then, to the third issue, namely, whether under the proof requirements mentioned above, the evidence is sufficient to sustain the convictions. We hold that it is.

The evidence shows that Hesli, the forger, had authority and responsibility to handle new car sales and to process and sign cash rebate applications. Christy Pontiac, not Hesli, got the GM rebate money, so that Hesli was acting in furtherance of the corporation's business interests. Moreover, there was sufficient evidence of management authorization, toleration, and ratification. Hesli himself, though not an officer, had middle management responsibilities for cash rebate applications. When the customer Gores asked Mr. Benedict, a salesman, about the then discontinued rebate, Benedict referred Gores to Phil Hesli. Gary Swandy, a corporate officer, signed the backdated retail buyer's order form for the Linden sale. James Christy, the president, attempted to negotiate a settlement with Gores after Gores complained. Not until after the Attorney General's inquiry did Christy contact divisional GM headquarters. As the trial judge noted, the rebate money "was so obtained and accepted by Christy Pontiac and kept by Christy Pontiac until somebody blew the whistle ***21** * * *." We conclude the evidence establishes that the theft by swindle and the forgeries constituted the acts of the corporation.

We wish to comment further on two aspects of the proof. First, it seems that the state attempted to prosecute both Christy Pontiac and James Christy, but its prosecution of Mr. Christy failed for lack of evidence. We can imagine a different situation where the corporation is the alter ego of its owner and it is the owner who alone commits the crime, where a double prosecution might be deemed fundamentally unfair. Secondly, it may seem incongruous that Hesli, the forger, was acquitted of three of the four criminal counts for which the corporation was convicted. Still, this is not the first time different trials have had different results. *See, e.g., State v. Cegon,* 309 N.W.2d 313 (Minn.1981). We are reviewing this record, and it sustains the convictions.

Affirmed.

KELLEY, J., took no part in the consideration or decision of this case.

All Citations

354 N.W.2d 17

End of Document

639 N.W.2d 393
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
COMPASSIONATE HOME CARE, INC., Appellant.

No. CX-01-683.
|
Feb. 12, 2002.
|
As Corrected Feb. 27, 2002.

Corporate defendant was convicted in the Isanti County District Court, Timothy R. Bloomquist, J., of criminal neglect of a vulnerable adult. Defendant appealed. The Court of Appeals, Willis, J., held that: (1) trial court erred in not providing jury instruction on corporate criminal liability; (2) such error was not harmless; and (3) trial court erred in failing to notify counsel of jury question and answering it without prior notification.

Reversed and remanded.

West Headnotes (11)

[1] **Criminal Law**
Form and Language in General

A district court is given considerable latitude in selecting the language of jury instructions.

Cases that cite this headnote

[2] **Criminal Law**
Duty of Judge in General

Criminal Law
Failure to Instruct

The refusal to give a particular jury instruction lies within the district court's discretion and no error results if no abuse of discretion is shown.

Cases that cite this headnote

[3] **Criminal Law**
Evidence Justifying Instructions in General

A party is entitled to a particular jury instruction if the evidence presented at trial supports the instruction.

Cases that cite this headnote

[4] **Criminal Law**
Construction and Effect of Charge as a Whole

Jury instructions are viewed in their entirety to determine whether the law of the case is fairly and adequately explained.

Cases that cite this headnote

[5] **Criminal Law**
Criminal Intent and Malice

Specific intent crimes require that the defendant acted with the intent to produce a specific result.

1 Cases that cite this headnote

[6] **Criminal Law**
Duty of Judge in General

The court has an obligation to clearly instruct the jury on exactly what it is they must decide.

Cases that cite this headnote

[7] **Criminal Law**
Intent, Motive, and Malice

Trial court erred by failing to give jury instruction on corporate criminal liability in prosecution of corporate home health caregiver for criminal neglect of a vulnerable adult; statute imposed criminal liability in part based upon specific intent of defendant, but jury was not informed exactly how it was to determine from the evidence of what various employees knew and what actions they took what the corporation intended or knowingly permitted to happen to victim. M.S.A. § 609.233 subd. 1.

Cases that cite this headnote

[8] **Criminal Law**

Elements and Incidents of Offense, and Defenses in General

It is desirable to explain the elements of the offense, not merely to read the statute.

Cases that cite this headnote

[9] **Criminal Law**

Instructions in General

An error in instructing the jury is harmless if it can be said beyond a reasonable doubt that the error had no significant impact on the verdict.

Cases that cite this headnote

[10] **Criminal Law**

Elements and Incidents of Offense

Trial court's error, in failing to give jury instruction on corporate criminal liability in prosecution of corporate home health caregiver for criminal neglect of a vulnerable adult, was not harmless; there was conflicting evidence of whether allowing victim to live in a tent, an experience that victim eagerly sought, and then in a bedroom of personal-care attendant's house, by themselves constituted neglect, and jury during deliberations asked court whether corporate defendant was liable and responsible for actions of its employees. M.S.A. § 609.233 subd. 1.

Cases that cite this headnote

[11] **Criminal Law**

Requisites and Sufficiency

Trial court erred, in prosecution of corporate home health caregiver for criminal neglect of a vulnerable adult, in failing to notify counsel of jury question regarding corporate criminal liability, and in answering such question without prior notification. 49 M.S.A., Rules Crim.Proc., Rule 26.03 subd. 19 (3)1.

Cases that cite this headnote

*394 *Syllabus by the Court*

The jury must be instructed on the theory of corporate criminal liability when a corporation is charged with a criminal offense and the state relies, at least in ***395** part, on statutory language imposing criminal liability based on specific intent.

Attorneys and Law Firms

Mike Hatch, Attorney General, Sara DeSanto, Assistant Attorney General, St. Paul (for respondent).

Richard H. Kyle, Jr., Minneapolis, (for appellant).

Considered and decided by WILLIS, Presiding Judge, CRIPPEN, Judge, and ANDERSON, Judge.

OPINION

WILLIS, Judge.

This appeal is from a conviction of criminal neglect of a vulnerable adult in violation of Minn.Stat. § 609.233, subd. 1 (1996). Because the district court abused its discretion in instructing the jury and erred in responding to a jury question without notifying counsel, we reverse and remand.

FACTS

Appellant Compassionate Home Care (CHC) is a corporation that is licensed to provide home-care services. In 1997, at the time of the events charged in the criminal complaint, CHC was owned by Charlie and Roberta Parker, and Trina Asche, the assistant administrator, was in charge of its day-to-day operations.

Since 1989, CHC had provided home-care services to Carol Forbes, a 52-year-old woman who was quadriplegic and suffered from cerebral palsy, scoliosis, osteoarthritis, degenerative joint disease, and asthma. In May 1997, these services were being provided by Kimberly Benjamin, a personal-care attendant (PCA) recently hired by CHC, as well as other PCAs. At that time, Forbes was living in an apartment complex in Stillwater.

In May 1997, Benjamin gave notice on behalf of Forbes to the manager of the apartment complex that Forbes would be moving out for a week or two to go camping. Benjamin called Asche at CHC's offices in Minneapolis to tell her that she was taking Forbes to the house where Benjamin was living in Isanti County, where Forbes would be "camping" in the backyard for one or two weeks. Benjamin told Asche that Forbes's equipment-a hospital bed and Hoyer lift, along with her medications-would be available in the tent. Asche approved the arrangement.

The state presented evidence that Forbes lived in the tent, whose walls were constructed only of mesh screening, for about ten days, through a wide range of temperatures and weather conditions. The supervising nurse who managed Forbes's care told a state investigator that she did not visit Forbes while she lived in the tent, and CHC kept no records documenting the living conditions there. Friends who visited Forbes reported that she seemed happy but that she also seemed isolated. Benjamin was not attending Forbes when the friends arrived, and she did not return until the friends had been there for two hours.

In early June, Benjamin moved Forbes from the tent into an upstairs bedroom in the house. The supervising nurse visited the house on June 10 and reported no problems with the living arrangements when she called Asche. Forbes's mother, however, visited her in Benjamin's house and testified that Forbes was in a very small bedroom, with no lift by her bed, and no air conditioning, although the weather was very hot. She also testified that, despite her daughter's asthma and allergies, there were three cats and two dogs in the house, as well as three smokers. When Forbes's social worker informed state officials of the change in Forbes's living situation, ***396** a state agency employee, later joined by Forbes's social worker and a representative of a private agency, visited the house and determined that the living conditions were "not safe." After the social worker began the process of having a conservator appointed, CHC moved Forbes out of Benjamin's house. Forbes died of a blood clot in her lungs the following month.

The state filed a criminal complaint charging CHC with neglect of a vulnerable adult. Shortly before trial, CHC requested that the district court instruct the jury on corporate criminal liability. The state submitted a proposed jury instruction on corporate criminal liability, although the prosecutor also argued that such an instruction was not necessarily appropriate. The district court declined to instruct the jury on corporate criminal liability, concluding that the legislature, in enacting the neglect statute, "clearly contemplated a corporate caregiver," yet had not attempted to define corporate criminal liability.

During its deliberations, the jury sent a written question to the court, asking

> Is Compassionate Care liable & responsible for the actions of their employees?

The district court, without notifying counsel, responded in writing, through the bailiff:

> I can't give you any further instructions. You will have to decide based on what you've been given.

The jury found CHC guilty of neglect of a vulnerable adult, in violation of Minn.Stat. § 609.233, subd. 1 (1996). CHC moved for a new trial, arguing that the district court erred in failing to instruct the jury on corporate criminal liability and by responding to the jury's question during deliberations without first notifying counsel. The district court denied CHC's motion. This appeal follows.

ISSUES

1. Did the district court abuse its discretion in refusing to instruct the jury on corporate criminal liability?

2. Did the district court prejudicially err in responding to a jury question without first notifying counsel?

ANALYSIS

I.

[1] [2] [3] [4] A district court is given "considerable latitude" in selecting the language of jury instructions. *State v. Gray,* 456 N.W.2d 251, 258 (Minn.1990) (quotations omitted). The refusal to give a particular jury instruction lies within the district court's discretion "and no error results if no abuse of discretion is shown." *State v. Cole,* 542 N.W.2d 43, 50 (Minn.1996). A party is entitled to a particular jury instruction if the evidence presented at trial supports the

instruction. *State v. Auchampach,* 540 N.W.2d 808, 816 (Minn.1995). Jury instructions are viewed in their entirety to determine whether the law of the case is fairly and adequately explained. *State v. Flores,* 418 N.W.2d 150, 155 (Minn.1988).

During trial, CHC requested a jury instruction on corporate criminal liability, based on language in *State v. Christy Pontiac-GMC, Inc.,* 354 N.W.2d 17, 20 (Minn.1984). The district court declined to give the requested instruction, concluding that because the criminal neglect statute "clearly contemplated a corporate caregiver" but the legislature had not included the language from *Christy Pontiac-GMC,* the standard jury instruction on the offense of criminal neglect was sufficient.

The criminal-neglect statute provides:

> A caregiver or operator who intentionally neglects a vulnerable adult or knowingly permits conditions to exist that ***397** result in the abuse or neglect of a vulnerable adult is guilty of a gross misdemeanor.

Minn.Stat. § 609.233, subd. 1 (1996). A "caregiver" is defined, in part, as an "individual or facility" that has "assumed responsibility" for the care of a vulnerable adult. Minn.Stat. § 609.232, subd. 2 (1996). CHC conceded at trial that it was a "caregiver." In particular, it appears that CHC was a "home care provider licensed or required to be licensed" and therefore a "facility." Minn.Stat. § 609.232, subd. 3 (1996).

The supreme court in *Christy Pontiac-GMC* held that "a corporation may be prosecuted and convicted for the crimes of theft and forgery." 354 N.W.2d at 19. The court, however, went on to lay out "the evidentiary basis on which criminal responsibility of a corporation is to be determined." *Id.* The court stated:

> We believe, first of all, the jury should be told that it must be satisfied beyond a reasonable doubt that the acts of the individual agent constitute the acts of the corporation.

Id. at 20. The court went on to specify "the kind of proof required," stating:

> we hold that a corporation may be guilty of a specific intent crime committed by its agent if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation * * *; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.

Id.

[5] The state argues that *Christy Pontiac-GMC* does not apply here because CHC was not charged with a specific-intent crime. The statute imposes criminal liability on a caregiver who "knowingly permits" conditions to exist that result in the abuse or neglect of a vulnerable adult. Minn.Stat. § 609.233, subd. 1. Specific intent requires that the defendant acted with the intent to produce a specific result. *State v. Orsello,* 554 N.W.2d 70, 72 (Minn.1996). The statutory language relied on by the state ("knowingly permit [s]") does not imply any intent to produce the prohibited result. But the statute also imposes criminal liability on a caregiver who "intentionally neglects" a vulnerable adult. Minn.Stat. § 609.233, subd. 1. In instructing the jury on the elements, the court included the "intentionally neglects" language, and even defined the term "intentionally."

CHC argues that the prosecution presented to the jury the theory that CHC intentionally neglected Forbes, as well as the theory that it "knowingly permitted" conditions of neglect. We agree that the prosecution argued to the jury several omissions on the part of CHC from which the jury could infer specific intent to neglect Forbes. The prosecutor emphasized CHC's failure to do an assessment of the living conditions in the tent, an omission that suggested intentional neglect while precluding the knowledge required to "knowingly permit." Moreover, the jury was not told who at CHC needed to "knowingly permit" conditions of neglect in order for the corporation to be guilty.

The prosecutor also argued that CHC failed to properly assess Forbes's living conditions in Benjamin's house and failed to keep adequate records. In listing these omissions, the prosecutor was arguing intentional neglect by CHC, not merely conditions that it permitted to exist. Furthermore, the jury, in asking about CHC's liability for the "actions" of its employees, appears to have focused on acts or omissions that could have been intentional, not ***398** merely on corporate knowledge or conditions that were permitted to exist.

[6] [7] [8] The court has an obligation to clearly instruct the jury on exactly what it is they must decide. *Rosillo v. State,* 278 N.W.2d 747, 749 (Minn.1979). The district court's instructions did not inform the jury exactly how it was to determine, from the evidence of what various CHC employees knew and what actions they took, what the *corporation* intended to do or "knowingly permitted" to happen to Carol Forbes. The district court concluded that the language of the criminal-neglect statute was sufficient. But, as the supreme court has held, it is desirable to explain the elements of the offense, not merely to read the statute. *State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn.2001). Here, while the district court gave the standard jury instruction on criminal neglect, CRIMJIG 13.76, it gave the jury no instruction on whose acts or knowledge could be imputed to the corporation. The court referred to the "defendant's act" and defined the requisite knowledge of the "actor" but did not tell the jury how or through whom a legal entity such as a corporation could act or have knowledge.

[9] The state argues that any error in failing to instruct the jury on corporate criminal liability was harmless because there was ample evidence to establish CHC's guilt, even under the *Christy Pontiac-GMC* test, and because the attorneys' closing arguments emphasized that corporate liability had to be based on the conduct of corporate management. An error in instructing the jury is harmless if it can be said beyond a reasonable doubt that the error had no significant impact on the verdict. *State v. Pendleton,* 567 N.W.2d 265, 270 (Minn.1997).

[10] The state points to the evidence that CHC's management (the Parkers and Asche) knew that Forbes was living in a tent and then in a bedroom in Benjamin's house. But there was conflicting evidence on whether those living situations by themselves constituted neglect. The evidence was not overwhelming that living in a tent for seven to ten days, a "camping" experience that Forbes had eagerly sought, constituted "neglect" or that CHC's management knew of conditions inside Benjamin's house that would constitute "neglect." *See* Minn.Stat. § 609.233, subd. 1 (defining neglect as failure to provide vulnerable adult with "necessary food, clothing, shelter, health care, or supervision"). Moreover, the jury's question, which was directed at corporate criminal liability, indicates that the court's failure to instruct on that subject may have had a significant impact on the verdict.

II.

CHC also argues that the district court erred in responding to the jury's written question about corporate criminal liability, submitted during the jury's deliberations, without giving notice to defense counsel.

The rule provides:

> If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom.

Minn. R.Crim. P. 26.03, subd. 19(3)1. The supreme court has recently emphasized the mandatory nature of the rule. *State v. Sessions,* 621 N.W.2d 751, 755-56 (Minn.2001) (noting that rule requiring that jury be conducted to the courtroom is mandatory and does not depend on the nature of the court's response).

[11] We conclude that the district court erred in failing to notify counsel of the question and in answering it without prior notification. As discussed above, the jury's question signaled its need for an instruction on corporate criminal liability. ***399** Had CHC's attorney been notified of the jury's question, he could have argued, with additional support, the need for such an instruction. Because we have concluded that failure to instruct on corporate criminal liability was reversible error, we need not determine whether the failure to notify counsel of the jury's question would by itself warrant a new trial.

DECISION

The district court abused its discretion in refusing to instruct the jury on corporate criminal liability. The court also erred in answering a jury question on that subject without first notifying counsel.

Reversed and remanded.

All Citations

639 N.W.2d 393

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2016 WL 22407
Only the Westlaw citation is currently available.
Court of Appeals of Minnesota.

Jane DOE 175, a minor, by her mother and natural guardian, Mother DOE 175, Appellant,
v.
COLUMBIA HEIGHTS SCHOOL DISTRICT, ISD No. 13, Respondent,
Christopher Lloyd Warnke, Defendant.

No. A15–0713.
|
Jan. 4, 2015.

Synopsis

Background: Student, who was sexually abused by football coach, brought action against school district alleging negligence, negligent supervision, and vicarious liability. The District Court, Anoka County, Bethany A. Fountain Lindberg, J., 2014 WL 7781077, granted summary judgment in favor of school district.

Holdings: The Court of Appeals, Hooten, J., held that:

[1] as an issue of first impression, school district was immune from vicarious liability for sexual abuse that was outside coach's scope of employment, and

[2] incidents involving student and coach did not render sexual abuse foreseeable.

Affirmed.

West Headnotes (16)

[1] Appeal and Error

On student's appeal from summary judgment entered in favor of school district on claims for negligence, negligent supervision, and vicarious liability arising out of football coach's sexual abuse of student, Court of Appeals would not consider the school district's argument that student's vicarious liability claim was mooted by stipulated dismissal of sexual battery claim against coach, where legal effect of stipulated dismissal was not raised before district court as alternative ground for summary judgment and was not adequately briefed to Court of Appeals.

Cases that cite this headnote

[2] Municipal Corporations

School district was immune from vicarious liability for football coach's sexual abuse of student under section of municipal tort claims act providing immunity for any claim against a municipality if the same claim would be excluded under state tort claims act if brought against the state; state tort claims act created general rule that state was immune from vicarious liability for torts of its employees unless they were committed within the scope of office or employment, and coach engaged in sexual misconduct for his own personal reasons, and not on behalf of the school district in the performance of duties or tasks lawfully assigned to him. M.S.A. §§ 3.732(1), 3.736(1), 466.03(15).

Cases that cite this headnote

[3] Appeal and Error

Whether statutory immunity applies is a question of law, which the Court of Appeals reviews de novo.

Cases that cite this headnote

[4] Municipal Corporations

Governmental entity claiming statutory immunity has the burden of proof.

Cases that cite this headnote

[5] Appeal and Error

Interpretation of a statute presents a question of law, which is reviewed de novo.

Cases that cite this headnote

[6] **Municipal Corporations**

Under the subdivision of the municipal tort claims act providing immunity from liability for any claim against a municipality, if the same claim would be excluded under the state tort claims act if brought against the state, a school district is not vicariously liable for the torts of its employees committed while acting outside the "scope of office or employment," as that phrase is used and defined in the state tort claims act, which provides the state immunity from vicarious liability for torts of its employees unless they were committed within the scope of office or employment. M.S.A. §§ 3.732(1), 3.736(1), 466.03(15).

Cases that cite this headnote

[7] **Statutes**

In interpreting a statute, the court cannot add words to the statute that the legislature did not supply.

Cases that cite this headnote

[8] **Negligence**

Alleged "red flags" witnessed by school personnel that student, who was sexually abused by football coach, yelled "I love you" to coach at football practice, that she and coach were seen talking in school parking lot, that she used computer in weight-room office while coach was supervising other students, and that coach was seen alone in weight room with young girl on a Saturday, did not render coach's sexual abuse of student foreseeable, and thus school district did not owe duty to student; incidents were not sufficiently similar to or indicative of sexual abuse as to give school district notice that inappropriate relationship existed, and there was no indication that any school district employee observed physical contact or sexual conduct of any kind between coach and student.

Cases that cite this headnote

[9] **Judgment**

To defeat summary judgment, the nonmoving party must do more than merely create a metaphysical doubt as to a factual issue or rest on mere averments; rather, the nonmoving party must offer substantial evidence to support each essential element of its cause of action, and speculation and innuendo are not sufficient.

Cases that cite this headnote

[10] **Negligence**

Elements of a negligence claim are the existence of a duty of care, breach of that duty, proximate causation, and injury.

Cases that cite this headnote

[11] **Negligence**

For purposes of a negligence claim, there is no general duty to protect another from harm, but a duty to protect arises if there is a special relationship between the parties and the risk is foreseeable.

Cases that cite this headnote

[12] **Negligence**

To make out a successful claim for negligent supervision, the plaintiff must prove: (1) the employee's conduct was foreseeable; and (2) the employer failed to exercise ordinary care when supervising the employee.

Cases that cite this headnote

[13] **Negligence**

To succeed on a claim of either negligence or negligent supervision, a plaintiff must prove that the risk in question was foreseeable.

Cases that cite this headnote

[14] **Negligence**

Whether a risk is foreseeable, as is required to succeed on a negligence or negligent supervision claim, is a legal question that must be decided by the district court before submitting a case to a jury.

Cases that cite this headnote

[15] **Negligence**

In the context of negligence and negligent supervision claims, foreseeability of the risk means a level of probability which would lead a prudent person to take effective precautions.

Cases that cite this headnote

[16] **Negligence**

Sexual abuse will rarely be deemed foreseeable, so as to give rise to a duty, in the absence of prior similar incidents.

Cases that cite this headnote

Syllabus by the Court

*1 Under Minnesota Statutes section 466.03, subdivision 15 (2014), a school district is not vicariously liable for the torts of its employees committed while acting outside the "scope of office or employment," as that phrase is used in Minnesota Statutes section 3 .736, subdivision 1 (2014), and defined in Minnesota Statutes section 3.732, subdivision 1(3) (2014).

Anoka County District Court, File No. 02–CV–11–7667.

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Michelle D. Kenney, Knutson, Flynn & Deans, P.A., Mendota Heights, MN, for amicus curiae Minnesota School Boards Association.

Considered and decided by KIRK, Presiding Judge; CHUTICH, Judge; and HOOTEN, Judge.

OPINION

HOOTEN, Judge.

In this second appeal, appellant challenges the district court's summary judgment dismissal of her claims against respondent school district for vicarious liability, negligence, and negligent supervision arising out of the sexual abuse of appellant by respondent's employee. We affirm.

FACTS

The material facts in this case are largely undisputed. In the fall of 2009, defendant Christopher Lloyd Warnke was an employee of respondent Columbia Heights School District, ISD No. 13, working as a football coach and weight room supervisor. Before hiring Warnke, the school district interviewed him, checked his references, and conducted a criminal background check on him. During the hiring process, the school district did not discover anything about Warnke that suggested he posed a risk to students.

When Warnke was hired by the school district in 2008, he received a copy of the school district's employee handbook,

which contained policies regarding how employees should interact with students. The handbook referenced the Columbia Heights School Board Policy Manual, which was available on the Internet. Policy # 423 of the policy manual stated, "Sexual relationships between school district employees and students, without regard to the age of the student, are strictly forbidden and may subject the employee to criminal liability."The policy also prohibited employees from dating students, having sexual interactions with students, and committing or inducing students to commit immoral or illegal acts. The policy directed employees to "employ safeguards against improper relationships with students and/or claims of such improper relationships."Warnke testified that he knew during the fall of 2009 that the policy prohibited school district employees from dating or having sexual interactions with students.

***2** In the fall of 2009, appellant Jane Doe 175 was fourteen years old and in the ninth grade in the Columbia Heights School District. Doe had first met Warnke when she was in the eighth grade and Warnke was coaching the eighth-grade football team. At that time, Doe was friends with football players on Warnke's team and would stop by and say hello to her friends at football games. Doe and Warnke got to know each other better at the start of her ninth-grade year, as she continued to visit her friends on the ninth-grade football team that Warnke then coached.

After a football game in the fall of 2009, Doe borrowed Warnke's cell phone to call her parents for a ride home. When she got home, she used the caller ID feature of her home telephone to acquire Warnke's cell phone number and proceeded to initiate correspondence with Warnke under a false identity. Doe used her personal cell phone to send Warnke text messages, pretending to be an adult woman interested in having a sexual relationship with him. After a week of exchanging text messages with Warnke, Doe admitted to him that she was the person who was sending the text messages. Warnke was initially angry with Doe, but he soon resumed texting with her, even though he knew that she was a ninth-grade student. Over the following weeks, Warnke and Doe exchanged hundreds of text messages, many of which contained graphic sexual content. Warnke also e-mailed Doe two photographs of his penis.

During this time period, Warnke and Doe saw each other in person mainly in the weight room that Warnke supervised. Doe testified that, with the exception of one incident of sexual contact, her visits to the weight room to see Warnke were limited to conversation, although the subject matter of these conversations was at times sexually explicit. Doe testified that other people were nearly always in the weight room when Warnke and Doe interacted, but that there were no other school district employees present when she visited Warnke in the weight room. Warnke testified that he was alone with Doe in the weight room on only two occasions. Once when Warnke was alone with Doe in the weight room office, he either placed Doe's hand on his penis or coerced her to touch his penis. [1] After this incident of sexual contact, Warnke and Doe continued to exchange sexual text messages.

On November 17, 2009, another student's mother contacted Doe's mother and told her that Warnke and Doe had been exchanging sexually explicit text messages. On November 18, 2009, that student told a school official about Warnke's inappropriate relationship with Doe. The district court stated that "[i]t is undisputed that the first time any [other] employees of the [school district] knew about the relationship between Warnke and [Doe] was November 18, 2009."The school district called the police the same day to report Warnke's sexual abuse. Warnke was arrested, and his employment was terminated shortly thereafter. In 2011, Warnke pleaded guilty to one count of fourth-degree criminal sexual conduct and two counts of solicitation of a minor to engage in sexual conduct.

***3** In October 2011, Doe filed a complaint against Warnke and the school district, alleging sexual battery against Warnke and vicarious liability, negligence, and negligent supervision against the school district. The school district moved for summary judgment on the three claims against it. In February 2013, the district court granted summary judgment to the school district on Doe's negligence and negligent supervision claims, but denied summary judgment on the vicarious liability claim. In March 2013, the district court certified two questions to this court, and the school district filed a notice of appeal to obtain answers to the certified questions, but this court dismissed the appeal on procedural grounds in January 2014. *Doe 175 by Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 40–41, 49 (Minn.App.2014).

In March 2014, the school district moved for summary judgment for a second time on the vicarious liability claim, raising for the first time an immunity defense. The district court granted summary judgment to the school district on Doe's vicarious liability claim. In this second appeal, Doe challenges the district court's grant of summary judgment to the school district on all three claims.

ISSUES

I. Is the school district's mootness argument properly before this court?

II. Did the district court err in granting the school district's motion for summary judgment on Doe's vicarious liability claim?

III. Did the district court err in granting the school district's motion for summary judgment on Doe's negligence and negligent supervision claims?

ANALYSIS

I.

[1] As a preliminary matter, the school district argues that Doe's vicarious liability claim is moot. Four months after the district court granted summary judgment to the school district on Doe's vicarious liability claim, but before Doe's current appeal to this court, Doe and Warnke stipulated that Doe's sexual battery claim against Warnke "shall be dismissed with prejudice." The district court dismissed the claim with prejudice by order dated October 31, 2014. On appeal, the school district argues for the first time that the October 2014 order renders moot Doe's vicarious liability claim. Specifically, the school district contends that its vicarious liability can be no greater than Warnke's direct liability and that the October 2014 order prevents Doe from establishing Warnke's direct liability.

The only issues appealed by Doe are whether the district court properly granted summary judgment to the school district on her vicarious liability, negligence, and negligent supervision claims. In response, the school district argues that the district court correctly granted summary judgment on Doe's vicarious liability claim on the basis of statutory immunity, but alternatively argues that we should not even review this summary judgment on appeal because the claim is now moot in light of the subsequent stipulated dismissal of Doe's claim against Warnke. However, in order to reach the issue of whether Doe's vicarious liability claim is moot, we would necessarily be required to determine as a matter of law whether a stipulated dismissal with prejudice is the equivalent of a release, such that the common law rule that "the release of the agent releases the principal from vicarious liability" would apply in this case. *See Booth v. Gades,* 788 N.W.2d 701, 707 (Minn.2010). The legal effect of the stipulated dismissal of Doe's claim against Warnke was not raised before the district court as an alternative ground for summary judgment and was not adequately briefed to this court. Rather, the only defense asserted by the school district in its second motion for summary judgment, ruled upon by the district court, and appealed by Doe relative to the school district's vicarious liability was statutory immunity. Therefore, we decline to consider the school district's mootness argument and proceed to the substance of the issues raised in this appeal. [2]

II.

*4 [2] Doe argues that the district court erred by granting the school district's motion for summary judgment on her vicarious liability claim. She contends that the district court erred in interpreting and applying the Minnesota municipal tort claims act, Minn.Stat. §§ 466.01–.15 (2014), and the Minnesota state tort claims act, Minn.Stat. § 3.736 (2014), to her claim. In its order granting the school district's second motion for summary judgment, the district court did not analyze whether the school district was subject to vicarious liability under Minn.Stat. § 466.02. Instead, the district court determined that the school district was immune from vicarious liability under Minn.Stat. § 466.03, subd. 15. We agree that even if the school district would otherwise be subject to vicarious liability under section 466.02, it would be immune from vicarious liability under section 466.03, subdivision 15.

[3] [4] On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.,* 644 N.W.2d 72, 76–77 (Minn.2002). We view the evidence in the light most favorable to the nonmoving party. *Id.* Whether immunity applies is a question of law, which we review de novo. *Schroeder v. St. Louis Cty.,* 708 N.W.2d 497, 503 (Minn.2006)."The party claiming statutory immunity has the burden of proof."*S.W. & J.W. ex rel. A.M.W. v. Spring Lake Park Sch. Dist. No. 16,* 580 N.W.2d 19, 22 (Minn.1998).

[5] The interpretation of a statute presents a question of law, which we review de novo. *Weston v. McWilliams & Assocs.,*

Inc., 716 N.W.2d 634, 638 (Minn.2006)."The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."Minn.Stat. § 645.16 (2014). The interpretation of section 466.03, subdivision 15, is an issue of first impression. "The first step in statutory interpretation is to determine whether the statute's language, on its face, is ambiguous."*Christianson v. Henke,* 831 N.W.2d 532, 536 (Minn.2013) (quotations omitted).

> In determining whether a statute is ambiguous, we will construe the statute's words and phrases according to their plain and ordinary meaning. A statute is only ambiguous if its language is subject to more than one reasonable interpretation. Multiple parts of a statute may be read together so as to ascertain whether the statute is ambiguous. When we conclude that a statute is unambiguous, our role is to enforce the language of the statute and not explore the spirit or purpose of the law. Alternatively, if we conclude that the language in a statute is ambiguous, then we may consider the factors set forth by the [l]egislature for interpreting a statute.

Id. at 536–37 (quotations and citations omitted). The parties offer conflicting interpretations of the language of the statute at issue here. But, because there is only one *reasonable* interpretation—the school district's—we conclude that the statute's language is unambiguous.

***5** **[6]** Section 466.02 provides: "Subject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function."The term "municipality" includes school districts. Minn.Stat. § 466.01, subd. 1. But, the term "scope of their employment or duties" is not defined in the municipal tort claims act. Section 466.03 details numerous "limitations and exceptions" to municipal vicarious liability. *Hansen v. City of St. Paul,* 298 Minn. 205, 211, 214 N.W.2d 346, 350 (1974). In relevant part, this section provides that every municipality shall be immune from liability for "[a]ny claim against a municipality, if the same claim would be excluded under [Minn.Stat. § 3.736], if brought against the state."Minn.Stat. § 466.03, subd. 15.

Section 3.736, subdivision 1, provides that, with some exceptions, the state can be held liable only for losses caused by the torts of its employees "while acting within the scope of office or employment."For purposes of section 3.736, "scope of office or employment" means "that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority."Minn.Stat. § 3.732, subd. 1(3). By limiting the state's vicarious liability to the torts of employees "acting within the scope of office or employment,"section 3.736 plainly excludes from vicarious liability torts committed by a state employee who was *not*"acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority."*See*Minn.Stat. § 645.19 (2014) (codifying the interpretive canon *expressio unius est exclusio alterius*). In addition to this implicit exclusion, the state tort claims act details numerous other exclusions from the state's vicarious liability, none of which are relevant here. *See* Minn.Stat. § 3 .736, subd. 3.

There is no dispute that Warnke engaged in sexual misconduct for his own personal reasons, not "on behalf of" the school district "in the performance of duties or tasks lawfully assigned by competent authority."*See*Minn.Stat. § 3.732, subd. 1(3). Therefore, if Warnke had been employed by the state rather than the school district, Doe's vicarious liability claim would have been "excluded under section 3.736." *See*Minn.Stat. § 466.03, subd. 15. Thus, in its summary judgment ruling, the district court correctly concluded that the school district was immune from liability under section 466.03, subdivision 15.

[7] Doe offers a different interpretation of the statute, but her interpretation is unreasonable. Doe claims that because section 466 .03, subdivision 15, uses the word "excluded," it refers only to the "[e]xclusions" of section 3.736, subdivision 3. *See*Minn.Stat. § 466.03, subd. 15 ("Any claim against a municipality, if the same claim would be *excluded* under section 3.736, if brought against the state."(emphasis added)). Doe then points out that none of the enumerated exclusions in the state tort claims act provides for immunity for claims of child sexual abuse and therefore argues that section 466.03, subdivision 15, does not confer immunity upon the school district. Doe's interpretation is flawed because section 466.03, subdivision 15, provides immunity to a municipality if the state would be immune "under section 3.736"—*not* if the state would be immune "under section 3.736, subdivision 3." This court cannot "add words to the statute that the [l]egislature did

not supply."*Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.,* 850 N.W.2d 682, 691 (Minn.2014). And, section 3.736, subdivision 1, specifically provides that the state may be vicariously liable only for injury "caused by an act or omission of an employee of the state while acting within the scope of office or employment."

*6 The school district persuasively argues that section 3.736, subdivision 1, creates a general rule that the state *is* immune from vicarious liability for the torts of its employees *unless* they were committed "within the scope of office or employment."Subdivision 3 expands this general rule by providing additional circumstances ("[e]xclusions") under which the state is immune, even if an employee's tort *was* committed "within the scope of office or employment."On the other hand, Doe's narrow, formalistic interpretation of section 466.03, subdivision 15, ignores the general rule of immunity set forth in section 3.736, subdivision 1.

Based upon our interpretation of the interplay between the municipal tort claims act and the state tort claims act, we hold that the school district is immune from vicarious liability under Minn.Stat. § 466.03, subd. 15. The district court did not err in granting summary judgment to the school district on Doe's vicarious liability claim.

III.

[8] **[9]** Doe next argues that the district court erred by granting summary judgment to the school district on her negligence and negligent supervision claims because the existence of alleged "red flags" should have put the school district on notice that Warnke's sexual abuse of Doe was foreseeable. The school district counters that Doe mischaracterizes the record to exaggerate the significance of the alleged red flags and contends that Warnke's sexual abuse of Doe was not foreseeable. To defeat summary judgment, the nonmoving party must do more than "merely create[ ] a metaphysical doubt as to a factual issue" or "rest on mere averments." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 71 (Minn.1997). Rather, the nonmoving party must offer "substantial evidence" to support each essential element of its cause of action. *See id.* at 70–71 (quotation omitted). Speculation and innuendo are not sufficient. *Johnson v. Van Blaricom,* 480 N.W.2d 138, 140 (Minn.App.1992).

[10] **[11]** **[12]** **[13]** The elements of a negligence claim are the existence of a duty of care, breach of that duty, proximate causation, and injury. *Bjerke v. Johnson,* 742 N.W.2d 660, 664 (Minn.2007). For purposes of a negligence claim, there is no general duty to protect another from harm, but a duty to protect arises if there is a special relationship between the parties and the risk is foreseeable. *Id.* at 665. Similarly, "[t]o make out a successful claim for negligent supervision, the plaintiff must prove (1) the employee's conduct was foreseeable; and (2) the employer failed to exercise ordinary care when supervising the employee."*C.B. by L.B. v. Evangelical Lutheran Church in Am.,* 726 N.W.2d 127, 136 (Minn.App.2007) (quotations omitted). Therefore, to succeed on a claim of either negligence or negligent supervision, a plaintiff must prove that the risk in question was foreseeable.

[14] **[15]** **[16]** Whether a risk is foreseeable is a legal question that must be decided by the district court before submitting a case to a jury. *Alholm v. Wilt,* 394 N.W.2d 488, 491 (Minn.1986). In the context of negligence and negligent supervision claims, foreseeability means "a level of probability which would lead a prudent person to take effective precautions."*Fahrendorff by Fahrendorff v. N. Homes, Inc.,* 597 N.W.2d 905, 912 (Minn.1999) (quotation omitted)."In determining whether a danger is foreseeable, courts look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility."*Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.,* 582 N.W.2d 916, 918 (Minn.1998). Sexual abuse "will rarely be deemed foreseeable in the absence of prior similar incidents."*K.L. v. Riverside Med. Ctr.,* 524 N.W.2d 300, 302 (Minn.App.1994), *review denied* (Minn. Feb. 3, 1995).

*7 The district court granted the school district's motion for summary judgment on these claims because it concluded that Warnke's sexual abuse of Doe was not foreseeable. The district court relied heavily on *P.L. v. Aubert,* 545 N.W.2d 666 (Minn.1996), in reaching this conclusion. In *P.L.,* the supreme court held that the sexual abuse of a student by a teacher did not impose liability on the school district because the teacher and student concealed their relationship, such that "closer vigilance would not have uncovered the relationship."*Id.* at 668. Doe argues that the existence of the following red flags is sufficient, when construed most favorably to her, to raise a genuine issue of material fact as to whether Warnke's sexual abuse of Doe was foreseeable and whether the school district had reason to know that Warnke posed a danger to Doe.

Doe yelling at Warnke at a football practice

Doe watched Warnke's football practice during the fall of 2009 on one or two occasions. On one of these occasions, Doe yelled to Warnke, "Chris, I love you." In response to Doe yelling this, L.S ., another football coach, told Warnke, "[T]hat's trouble." Warnke did not respond to Doe, and L.S. asked Doe to leave the practice.

Doe and Warnke talking in a school parking lot

In late September or early October 2009, L.S. saw Warnke and Doe talking in a school parking lot after football practice. Several other students and coaches were in the parking lot at the time. In her appellate brief, Doe states that the conversation took place while she and Warnke were "alone" in the parking lot, but this mischaracterizes the record. L.S. testified that "[t]hey weren't alone. They were talking to each other, but there [were] lots of people in the parking lot."L.S. further testified that he did not find it odd to see Doe and Warnke talking in the parking lot, as "it wasn't uncommon for coaches, male or female, to be talking to students."

Doe using the weight room office computer

Sometime in the fall of 2009, L.S. and another football coach saw Doe using a computer in the weight room office while Warnke was supervising the weight room. Warnke was not in the office at the time, as he was lifting weights with football players in the weight room. L.S. or the other coach said to Warnke something like, "[S]he needs to leave," to which Warnke responded, "She's not my problem." L.S. testified that, while he had seen Doe in the weight room from time to time, he did not recall ever seeing Doe interacting with Warnke in the weight room. L.S. indicated that both female and male athletes used the weight room. Doe testified that she was an athlete and that she often visited the weight room with her brother, who was on the junior varsity football team. L.S. testified that the weight room office, which was located near the entryway of the weight room, was shared by several coaches who supervised the weight room. When asked about the weight room office, Doe stated: "It's just open. Anybody [could] go in there."Doe testified that she had accessed the computer "probably a couple of times" using her student login. L.S. testified that he was unaware of any policies related to students using the computer in the weight room office.

Warnke alone in the weight room with a young girl on a Saturday

***8** Another weight room supervisor saw Warnke alone with an unknown "young girl" in the weight room on a Saturday morning when Warnke was supervising the weight room. The weight room supervisor did not report this observation to school officials until the school district conducted its internal investigation of Warnke's sexual abuse. When asked about this incident, Warnke testified that he had never been confronted about being alone in the weight room with a young girl. He also testified that his daughter would occasionally accompany him to the weight room on Saturdays when his wife was working.

Even viewing the record in the light most favorable to Doe, these alleged red flags were insufficient to raise a genuine issue of material fact as to whether Warnke's sexual abuse of Doe was foreseeable. Taken in context, the incidents Doe cites are not sufficiently similar to or indicative of sexual abuse as to give the school district notice that an inappropriate relationship existed between Warnke and Doe. First, Doe's "Chris, I love you" shout was a single statement by a teenage girl at a football practice, Warnke did not react to the shout, and Doe was instructed to leave the practice after she shouted. Second, as to the observation of Doe talking to Warnke in the school parking lot, the record indicates that Doe and Warnke were *not* alone and that it was common to see coaches talking with students in the parking lot after sports practices. Third, the observation of Doe using a computer in the weight room office while Warnke was supervising other students in the weight room is not an objectively reasonable indicator of a potentially inappropriate relationship between Warnke and Doe. Fourth, observations of Warnke and an unidentified young female alone in the weight room on a Saturday do not raise any reasonable inferences of potential or ongoing sexual abuse. Furthermore, there is no evidence that any school district employee observed physical contact or sexual conduct of any kind between Warnke and Doe.

Doe alternatively argues that foreseeability in this case is a "close call," presenting a jury question. *See Whiteford,* 582 N.W.2d at 918 ("In close cases, the question of foreseeability is for the jury."). Even viewing the evidence in the light most favorable to Doe, however, these incidents gave no "objectively reasonable" indication of a "specific danger" of potential or ongoing sexual abuse. *Id.* Our review of these facts shows that foreseeability was not a "close call" that should be decided by a jury.

Doe contends that inadequate training by the school district might be the reason why the school district's employees

failed to discern the significance of the alleged red flags. But, Doe does not identify any additional training that would have caused school district employees to view the benign interactions she characterizes as red flags as indicators of possible sexual abuse. The mere assertion that additional training might have affected observers' perceptions is not sufficient to defeat summary judgment. *See DLH, Inc.*, 566 N.W.2d at 70–71 (requiring substantial evidence and not mere averments to defeat summary judgment).

***9** Based on the undisputed facts in the record, we agree with the district court that Warnke's sexual abuse of Doe was not foreseeable. The district court did not err in granting summary judgment to the school district on Doe's negligence and negligent supervision claims.

DECISION

Because the school district is immune from vicarious liability under the municipal tort claims act, we affirm the district court's grant of summary judgment to the school district on Doe's vicarious liability claim. And, because Warnke's sexual abuse of Doe was not foreseeable, we affirm the district court's grant of summary judgment to the school district on Doe's negligence and negligent supervision claims.

Affirmed.

All Citations

--- N.W.2d ----, 2016 WL 22407

Footnotes

1 While Doe and Warnke disputed whether Warnke placed Doe's hand on his penis or coerced her to touch his penis, this fact dispute did not affect the district court's analysis of the issues on summary judgment and does not affect our analysis.

2 If we were to reverse the district court's grant of summary judgment on Doe's vicarious liability claim—which we are not doing—the school district would then have the opportunity to argue about the effect of the stipulated dismissal before the district court. But, because we are affirming on this issue, the school district's alternative argument (mootness) need not be addressed. Even if we were to agree that the vicarious liability claim is moot, a discretionary exception to the mootness doctrine would allow us to reach the merits of this issue. *See Dean v. City of Winona*, 868 N.W.2d 1, 6 (Minn.2015) ("We have the discretion to consider a case that is technically moot when the case is functionally justiciable and presents an important question of statewide significance that should be decided immediately."(quotations omitted)).

2013 WL 5418170

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,

v.

FINAL EXIT NETWORK, INC., Respondent,
Lawrence Deems Egbert, Respondent,
Roberta L. Massey, Respondent.

Nos. A13–0563, A13–0564, A13–0565.

Sept. 30, 2013.

Synopsis

Background: Right-to-die organization, its medical director and case coordinator were criminally charged based on their alleged involvement in an assisted suicide. Defendants moved to dismiss, challenging constitutionality of statute criminalizing speech that "advises" or "encourages" another in taking the other's life. The District Court, Dakota County, found statute unconstitutional in part and denied defendants' motions to dismiss in part. State filed three pretrial appeals, which were consolidated. Defendants filed notice of related appeal.

Holdings: The Court of Appeals, Bjorkman, J., held that:

[1] speech intentionally advising or encouraging another in the commission of suicide was not traditionally unprotected speech, and thus statute prohibiting such speech was subject to strict scrutiny;

[2] statute bore no necessary relationship to state's interest in preventing suicide, and thus violated the First Amendment right to free speech; but

[3] indictment charging defendants with advising, encouraging or assisting another in the commission of suicide was not rendered invalid.

Affirmed in part, reversed in part, and remanded.

West Headnotes (3)

[1] **Constitutional Law**
Particular offenses in general
Suicide
Advising, aiding, or agreeing to commit

Speech intentionally advising or encouraging another in the commission of suicide was not traditionally unprotected speech, and thus statute criminalizing such speech was subject to strict scrutiny and presumptively invalid under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
Particular offenses in general
Suicide
Advising, aiding, or agreeing to commit

Statute prohibiting speech that "advises" and "encourages" another in the commission of suicide bore no necessary relationship to state's interest in preventing suicide, and thus violated the First Amendment right to free speech; statute criminalized any and all expressions of support, guidance, planning, or education to people who wanted to end their own lives, whether from a public platform, such as a book, or in the private setting of a hospital room or family home, and statute likely criminalized even patently political speech endorsing a right to die. U.S.C.A. Const.Amend. 1; Minn.Stat. § 609.215.

Cases that cite this headnote

[3] **Constitutional Law**
Particular offenses in general
Suicide
Advising, aiding, or agreeing to commit

Indictment charging defendants with violating statute prohibiting a person from advising, encouraging or assisting another in the

commission of suicide was not invalid, even though criminalization of speech advising or encouraging another in committing suicide violated the First Amendment, where the record of grand jury proceedings contained sufficient evidence to establish a reasonable probability that defendants violated the undisputedly constitutional provision prohibiting a person from assisting another in the commission of suicide. U.S.C.A. Const.Amend. 1; Minn.Stat. § 609.215.

Cases that cite this headnote

West Codenotes

Held Unconstitutional
Minn.Stat. § 609.215

Dakota County District Court File Nos. 19HA–CR–12–1721, 19HA–CR–12–1719, 19HA–CR–12–1718.

Attorneys and Law Firms

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Robert Rivas (pro hac vice), General Counsel, Final Exit Network, Inc., Tallahassee, FL and Mark D. Nyvold, Fridley, MN, for respondents.

Considered and decided by PETERSON, Presiding Judge; STONEBURNER, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge.

***1** These consolidated pretrial appeals concern the constitutionality of Minn.Stat. § 609.215, subd. 1 (2006), which criminalizes speech that "advises" and "encourages" another in taking the other's life. Appellant State of Minnesota argues that the district court erred by determining that criminalizing speech that "advises" suicide violates the First Amendment to the United States Constitution. By notices of related appeals, respondents argue that the district court erred by determining that the statute's provision relating to speech that "encourages" can be narrowly construed to be constitutional. Respondents also argue that the district court erred by concluding that probable cause supports the indictment charging them with violating Minn.Stat. § 609.215 (2006). We affirm in part, reverse in part, and remand.

FACTS

Respondent Final Exit Network, Inc. (FEN) is a Georgia non-profit corporation that provides its members end-of-life counseling and exit-guide services, which include information and support for members seeking to hasten their deaths. If a member is interested in exit-guide services, a first responder interviews the member by phone to gather information about the member's medical condition, family history, reasons for wishing to hasten death, and desired timing of death. The first responder also asks the member to submit a personal letter relating these facts, along with documentation of the member's medical condition, and instructs the member to read the book *Final Exit* by Derek Humphry or watch the video *Final Exit* .

FEN's medical director, respondent Lawrence Egbert, reviews the first responder's interview notes and the member's medical documentation and personal letter and either approves or rejects the member's request for exit-guide services. If Egbert approves the request, FEN's case coordinator, respondent Roberta Massey, assigns exit guides according to the member's location. Both Egbert and Massey also serve as exit guides. The assigned exit guides contact the member, develop a relationship with him or her, and provide information about helium asphyxiation, FEN's recommended method of hastening death. The exit guides instruct the member to purchase two specific types of helium tanks from a party store, a plastic "hood," and plastic tubing with joints that allow the lines from each tank to connect to a single tube running into the hood. FEN requires that members have the physical ability to perform those tasks themselves and tells exit guides never to purchase or set up the materials for a member. Two exit guides are present for the death and may hold the member's hands, not only for support and comfort, but also to prevent involuntary jerking that could result in tearing the plastic hood. The exit guides remain with the member until they are certain that the member is dead. They then remove from the residence and discard the helium tanks, the tubing, the hood, and any materials related to FEN.

*2 The charges at issue here stem from the alleged involvement of FEN, Egbert, and Massey in the death of 57–year–old Doreen Dunn. At the time of Dunn's death in May 2007, she had been living with chronic pain for more than a decade, as a result of various medical conditions, and had discussed suicide with her husband, who opposed it. But there was no sign of suicide in Dunn's home, and her autopsy listed her cause of death as atherosclerotic coronary artery disease. Law enforcement subsequently received information linking FEN to Dunn's death. Internal FEN records indicate that Dunn became a FEN member in early 2007. Telephone and fax records reveal Dunn had regular contact with various FEN representatives throughout early 2007, including faxing a personal letter and medical documentation to Massey. Flight records and internal FEN records show that Egbert and exit guide Jerry Dincin made single-day roundtrip flights from their home states of Maryland and Illinois, respectively, to Minnesota on the day of Dunn's death. And FEN records note when Dunn died.

In May 2012, a grand jury returned a 17–count indictment charging Egbert and FEN with (1) advising, encouraging, or assisting another in committing suicide; (2) aiding and abetting the offense of advising, encouraging, or assisting another in committing suicide; (3) interfering with a body or death scene; and (4) aiding and abetting the offense of interfering with a body or death scene; and charging Massey with (1) advising, encouraging, or assisting another in committing suicide; (2) aiding and abetting the offense of advising, encouraging, or assisting another in committing suicide; and (3) aiding and abetting the offense of interfering with a body or death scene. [1]

Massey, Egbert, and FEN moved to dismiss the charges of advising, encouraging, or assisting another in committing suicide, arguing that the parts of the statute that criminalize advising and encouraging are facially overbroad in violation of the First Amendment, and that the evidence presented to the grand jury did not establish probable cause to support the charges. The district court granted the motions in part, holding that the prohibition on advising is unconstitutionally overbroad but that the prohibition on encouraging is not because it can be narrowly construed to impose a necessary restriction only on speech meant to induce another to commit suicide. The district court further concluded that the evidence presented to the grand jury established a reasonable probability that Egbert's conduct fell within the constitutional parameters of Minn.Stat. § 609.215 and denied Egbert's and FEN's motions to dismiss for lack of probable cause. The district court also held the evidence established a reasonable probability that Massey aided and abetted Egbert (and Dincin) in that conduct, and denied her motion to dismiss as to the aiding-and-abetting charge but dismissed the charge of advising, encouraging, or assisting another in committing suicide.

*3 The state filed these pretrial appeals challenging the district court's ruling on the "advises" part of the statute. We consolidated the three appeals. Egbert, Massey, and FEN (collectively, respondents) filed a notice of related appeal challenging the district court's ruling with respect to the "encourages" part of the statute and the district court's denial of their motion to dismiss the indictments for lack of probable cause.

DECISION

I. Minn.Stat. § 609.215's criminalization of speech that "advises" and "encourages" another in taking the other's life infringes on protected speech and is facially overbroad .

The parties [2] challenge the district court's determinations that the criminalization of speech that "advises" is facially overbroad but the criminalization of speech that "encourages" can be narrowly construed to avoid overbreadth. [3] The constitutionality of a statute presents a question of law, which we review de novo. *State v. Crawley,* 819 N.W.2d 94, 101 (Minn.2012), *cert. denied,*—— U.S. ——, 133 S.Ct. 1493, 185 L.Ed.2d 548 (2013). Under the First Amendment, "esthetic and moral judgments" are for the individual to make, and the government generally may not restrict expression "because of its message, its ideas, its subject matter, or its content."*Brown v. Entm't Merchs. Ass'n,* —— U.S. ——, ——, 131 S.Ct. 2729, 2733, 180 L.Ed.2d 708 (2011) (quotations omitted)."Content-based restrictions of speech are presumptively invalid, and ordinarily subject to strict scrutiny."*Crawley,* 819 N.W.2d at 100 (footnote omitted) (citations omitted). Certain content-defined categories of speech, however, do not receive the full protection of the First Amendment and may be regulated more freely. *See United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010); *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 383, 112 S.Ct. 2538, 2543, 120 L.Ed.2d 305 (1992) (discussing regulation of unprotected speech).

As the state concedes, the prohibitions on intentionally advising and encouraging another in committing suicide are content-based restrictions on speech because "whether a person may be prosecuted under the statute depends entirely on what the person says."*See Crawley,* 819 N.W.2d at 101.We therefore consider (1) whether the First Amendment protects speech advising or encouraging another in suicide and, if so, (2) whether the criminalization of such speech survives strict scrutiny.

A. Protected vs. unprotected speech

[1] First Amendment protection presumptively extends to all speech, from the "[w]holly neutral futilities" of private everyday life to the discomfiting array of public discourse. *See Cohen v. California,* 403 U.S. 15, 20–21, 25, 91 S.Ct. 1780, 1785–86, 1788, 29 L.Ed.2d 284 (1971) (alteration in original) (quotation omitted) (holding "distasteful" objection to military draft emblazoned on a jacket is protected speech); *see also United States v. Alvarez,* —— U.S. ——, ——, 132 S.Ct. 2537, 2551, 183 L.Ed.2d 574 (2012) (holding that "contemptible" false claim to Congressional Medal of Honor is protected speech); *Brown,* 131 S.Ct. at 2738 (holding that "disgusting" graphically violent video games sold to children are protected speech). Freedom of speech excludes only those "historic and traditional categories" of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem."*Stevens,* 130 S.Ct. at 1584 (quotations omitted). These "well-defined and narrowly limited" categories of unprotected speech are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.*

***4** The state acknowledges that speech intentionally advising or encouraging another in committing suicide does not fall within any of these traditional categories but urges us to recognize such speech as a new category of unprotected speech. [4] The state contends that speech advising or encouraging another in suicide has little social value and is comparable to the historically unprotected category of speech integral to criminal conduct because suicide is historically recognized as a "grievous public wrong akin to conduct statutorily identified as a crime."We are not persuaded.

First, the Supreme Court expressly rejected the cost-benefit analysis the state advocates. In *Stevens,* the government urged the Supreme Court to recognize depictions of animal cruelty as a new category of unprotected speech, arguing that recognition should turn on the use of a simple balancing test that weighs "the value of the speech against its societal costs."*Id.* at 1585.The Supreme Court rejected that proposal as "startling and dangerous," explaining that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."*Id.*

Second, while the Supreme Court has stated that there may be "some categories of speech that have been historically unprotected [though] not yet ... specifically identified or discussed as such in [Supreme Court] case law,"*id.* at 1586, it cautioned that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."*Brown,* 131 S.Ct. at 2734.Rather, the state must present "persuasive evidence" that the content-based speech restriction in question "is part of a long (if heretofore unrecognized) tradition of proscription."*Id.; see also Alvarez,* 132 S.Ct. at 2547 (declining to recognize new category of unprotected speech absent such evidence).

The state has not done so here. The state asserts only that speech intentionally advising or encouraging another in suicide is similar to speech integral to criminal conduct and therefore similarly unprotected. We disagree. While the Supreme Court has permitted clarification of traditionally unprotected categories of speech, *see Ginsberg v. New York,* 390 U.S. 629, 638, 88 S.Ct. 1274, 1279–80, 20 L.Ed.2d 195 (1968) (permitting adjustment of obscenity category to account for minors), it has rejected similar attempts to shoehorn new categories into traditionally unprotected categories of speech, *see Alvarez,* 132 S.Ct. at 2545 (rejecting argument that all false speech is unprotected because defamation and fraud are unprotected); *Brown,* 131 S.Ct. at 2734–35 (rejecting argument that graphic violence is unprotected because it is similar to obscenity). In short, the specific content-defined category of speech must itself be traditionally proscribed. We discern no such tradition with respect to speech advising or encouraging another in suicide. To the contrary, while assisting suicide is traditionally and broadly proscribed, *see generally Washington v. Glucksberg,* 521 U.S. 702, 714–16, 117 S.Ct. 2258, 2264–65, 138 L.Ed.2d 772 (1997), few states join Minnesota in taking the additional step of criminalizing speech advising or encouraging another in the noncriminal act of taking one's own life. [5] *See*Cal.Penal Code § 401 (West 2010); La.Rev.Stat. Ann. § 14: 32.12 (West 2007); Miss.Code Ann. § 97–3–49 (West 2006); Okla. Stat.

Ann. tit. 21, § 813 (West 2002); S.D. Codified Laws § 22–16–37 (2006); *Standford v. Kentucky,* 492 U.S. 361, 373, 109 S.Ct. 2969, 2977, 106 L.Ed.2d 306 (1989) (stating that "the primary and most reliable indication of [a national] consensus is ... the pattern of enacted laws"). Accordingly, we discern no "long ... tradition of proscri [bing]" speech that advises or encourages another in taking the other's life.

***5** Because the state has not demonstrated that speech intentionally advising or encouraging another in the commission of suicide is traditionally unprotected speech, the prohibition of such speech in Minn.Stat. § 609.215 is invalid unless the state can demonstrate that it passes strict scrutiny. *See Brown,* 131 S.Ct. at 2738.

B. Strict scrutiny

[2] A restriction on the content of protected speech passes strict scrutiny when it is (1) justified by a compelling government interest and (2) narrowly drawn to serve that interest. *Id.* A restriction is narrowly drawn when it is "actually necessary" to achieve the government's interest. *Alvarez,* 132 S.Ct. at 2549 (quotation omitted). That is, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented," and the restriction must be "the least restrictive means among available, effective alternatives."*Id.* at 2549, 2551 (quotation omitted). A law that restricts substantially more or less speech than necessary fails this test. *See Brown,* 131 S.Ct. at 2738–42 (discussing overbreadth and underbreadth); *Stevens,* 130 S.Ct. at 1587 (stating that a law "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").

As to the first prong of the strict-scrutiny analysis, it is well established that the state has a compelling interest in preserving human life. *See Cruzan by Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 282, 110 S.Ct. 2841, 2853, 111 L.Ed.2d 224 (1990). This extends to preventing suicide and protecting vulnerable groups from suicidal impulses and undue influence, but the state also has an interest in protecting the individual's "dignity and independence at the end of life."*See Glucksberg,* 521 U.S. at 716, 730–31, 117 S.Ct. at 2265, 2272–73.

To determine whether Minnesota's prohibition of speech advising or encouraging another in suicide is necessary to serve the state's interests, we must first identify what speech the statute restricts. *See United States v. Williams,* 553 U.S. 285, 293, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008) (stating that "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers"). We construe statutes de novo, with the goal of ascertaining and giving effect to the legislature's intent. *Crawley,* 819 N.W.2d at 102.We consider the statute "as a whole," giving words and phrases their plain and ordinary meaning. *In re Welfare of J.J.P.,* 831 N.W.2d 260, 264 (Minn.2013).

The plain language of Minn.Stat. § 609.215 is broad, criminalizing any speech that "intentionally advises [or] encourages ... another in taking the other's own life."While the statute does not define its terms, advise ordinarily means to "offer advice to," to counsel, or to inform. *See The American Heritage Dictionary* 25 (5th ed.2011); *Webster's Third New Int'l Dictionary* 32 (unabr.1993). And encourage means to "inspire with hope, courage, or confidence," to support, or to stimulate or spur on. *The American Heritage Dictionary* 587 (5th ed.2011); *Webster's Third New Int'l Dictionary* 747 (1993). None of these definitions requires the speaker to take the active role in another's suicide that the term assists requires.[6] *See American Heritage Dictionary* 108 (5th ed.2011) (defining assist as to give help, support, or aid to another); *Webster's Third New Int'l Dictionary* 132 (unabr.1993) (defining assist as to perform some service for another). Nor does the statute require causation or even express promotion of suicide but only advising or encouraging another "in taking the other's own life."As written, therefore, Minn.Stat. § 609.215 criminalizes any and all expressions of support, guidance, planning, or education to people who want to end their own lives, whether from a public platform, such as a book, or in the private setting of a hospital room or family home. It likely criminalizes even patently political speech endorsing a right to die.

***6** As the district court concluded, and the state now concedes, the state's interest in preventing suicide does not justify these extreme limitations on protected speech about suicide. No significant causal connection exists between the broad range of advising and encouraging speech prohibited by Minn.Stat. § 609.215 and suicide. And the state could achieve its goals through less-restrictive means. To protect vulnerable people from being coerced or unduly influenced to commit suicide, the state could draft a statute that prohibits only that speech.[7] *See, e.g.,*Del.Code Ann. tit. 11, § 645 (West 2007) ("causes"); 720 Ill. Comp. Stat. Ann. § 5/12–34.5 (West 2013) ("coerces"); 18 Pa. Cons.Stat. Ann. § 2505 (West 1983) ("causes ... by force, duress or deception"). And

the state has already expressly prohibited assisting suicide, so restrictions on advising and encouraging speech are not necessary to prevent assisted suicide.

The district court nonetheless concluded that the prohibition of speech that "encourages" another in suicide can be narrowly construed to survive strict scrutiny. And the state argues that our supreme court's recent decision in *Crawley* requires us to similarly construe "advises" to limit the reach of that prohibition on speech to only those categories of speech that necessarily infringe on the state's compelling interest.[8] We disagree. In *Crawley,* the supreme court held that a statute criminalizing false reports about police officers is constitutional when narrowly construed to encompass only unprotected defamatory speech. 819 N.W.2d at 105–07.But it did not do so based on a freewheeling authority to revise facially unconstitutional statutes. Rather, it relied on the Supreme Court's authorization and encouragement to state supreme courts to "sustain the constitutionality of state statutes regulating speech by construing them narrowly *to punish only unprotected speech.*" *Crawley,* 819 N.W.2d at 105 (emphasis added) (citing *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942)); *see also Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973) (explaining that a statute should not be declared invalid for facial overbreadth if a "limiting construction has been or could be placed on the challenged statute" to "remove the seeming threat or deterrence to constitutionally protected expression"). Because the statute at issue in *Crawley* encompassed unprotected defamatory speech and protected non-defamatory speech, the supreme court construed the statute narrowly to punish only the unprotected category of speech. 819 N.W.2d at 104, 107.That same approach cannot save the "advises" and "encourages" provisions in Minn.Stat. § 609.215.

The plain language of Minn.Stat. § 609.215 limits only protected speech. When a statute addresses only protected speech, a court cannot "rewrite a ... law to conform it to constitutional requirements."*See Stevens,* 130 S.Ct. at 1592 (quotation omitted); *see also Holder v. Humanitarian Law Project,* 561U.S. 1, ——, 130 S.Ct. 2705, 2718, 177 L.Ed.2d 355 (2010) ("Although this court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute."). To do so "would constitute a serious invasion of the legislative domain" and "sharply diminish" the legislature's incentive to draft appropriately narrow laws in the first place. *Stevens,* 130 S.Ct. at 1592.Because section 609.215 lacks any identifiable category of unprotected speech to which the statute's scope can be limited, we cannot impose a narrowing construction that saves the statute.

*7 Moreover, even as construed by the state, the statute chills a significant amount of protected speech that does not bear a necessary relationship to the state's objective of preventing suicide. In particular, the state asserts that it would only seek to proscribe speech intended to educate a specific person whom the actor knows to be contemplating suicide about methods of doing so. This prohibition is significantly more narrow than the sweeping statutory language but still bears no necessary relationship to preventing suicide since less specifically targeted information about methods of suicide is easily accessible in numerous fora and just as likely to facilitate suicide.

We do not doubt the state's substantial concern about suicide and the vulnerability of those contemplating ending their lives. But the state may not infringe on constitutionally protected speech, no matter how significant the concern, unless it demonstrates that doing so is necessary to address that concern. Because it has failed to do so here, we conclude that the provisions in Minn.Stat. § 609.215 criminalizing speech advising or encouraging another in taking the other's own life are unconstitutional.

II. The district court did not err by denying respondents' motion to dismiss the indictments for lack of probable cause.

A grand jury indictment carries "a presumption of regularity," and the defendant seeking to overturn it "bears a heavy burden." *State v. Eibensteiner,* 690 N.W.2d 140, 151 (Minn.App.2004), *review denied* (Minn. Mar. 15, 2005). Probable cause exists to charge a defendant when evidence worthy of the grand jury's consideration-both direct and circumstantial-renders the charge reasonably probable. *State v. Flicek,* 657 N.W.2d 592, 596 (Minn.App.2003); *see State v. Martin,* 567 N.W.2d 62, 66 (Minn.App.1997) (permitting reliance on circumstantial evidence), *review denied* (Minn. Sept. 18, 1997). A reviewing court defers to the grand jury's role as fact-finder and should dismiss an indictment only when there are no issues of fact and the defendant's conduct could not constitute the offense as a matter of law. *Eibensteiner,* 690 N.W.2d at 151;*see also*Minn. R.Crim. P. 17.06, subd. 2(1)(a). We review de novo a district court's decision on a motion to dismiss an indictment for lack of probable cause. *See State v. Inthavong,* 402 N.W.2d 799,

802–03 (Minn.1987) (considering directly the sufficiency of evidence before grand jury); *Eibensteiner,* 690 N.W.2d at 154 (same).

[3] Respondents argue that the indictment must be dismissed because the grand jury was instructed to indict if there is probable cause to believe respondents intentionally advised, encouraged, or assisted Dunn in committing suicide, rather than receiving a more limited instruction consistent with our conclusion that the constitutional reach of Minn.Stat. § 609.215 is limited to criminalizing intentionally assisting another in committing suicide. We disagree. "[E]rroneous instructions given a grand jury, whether by the court or the prosecutor, will not invalidate an indictment absent a showing of prejudice," which "ordinarily will be found only on those rare occasions where the grand jury instructions are so egregiously misleading or deficient that the fundamental integrity of the indictment process itself is compromised."*Inthavong,* 402 N.W.2d at 802.And as the state pointed out at oral argument, it was not required to charge the offenses at issue here by indictment. *See*Minn. R.Crim. P. 17.01, subd. 1 (requiring indictment only for offenses punishable by life imprisonment and permitting all other offenses to be charged by complaint). Accordingly, any flaws in the instructions to the grand jury are harmless so long as the evidence establishes a reasonable probability that respondents' conduct fell within the constitutional parameters of Minn.Stat. § 609.215.

***8** The record indicates that Egbert and Dincin were Dunn's exit guides. While the record contains evidence that FEN instructs exit guides not to participate in procuring or assembling the materials used for helium asphyxiation, it also contains evidence suggesting such participation in Dunn's case. Specifically, Dunn's physical limitations, which prevented her from engaging in activities requiring fine motor skills or driving more than a few blocks from home alone, and the apparent absence of the materials necessary for helium asphyxiation in the home before her death reasonably support an inference that Egbert and/or Dincin procured or assembled the materials for her, thereby assisting in her suicide. And evidence that FEN expressly permits exit guides to hold a member's hand to prevent tearing of the plastic hood and instructs them to ensure the member is dead before removing the hood could reasonably be considered assistance in suicide attributable equally to Egbert and FEN. *See State v. Christy Pontiac–GMC, Inc.,* 354 N.W.2d 17, 20 (Minn.1984) (stating that corporate liability for specific-intent crimes requires proof that (1) the agent was acting within the scope of employment, (2) in furtherance of the corporation's business interests, and (3) the criminal acts were authorized, tolerated, or ratified by corporate management). Finally, the evidence of Massey's role in FEN and her communications with Dunn, Dincin, and Egbert specifically about Dunn's request for exit-guide services, establishes a reasonable probability that she intentionally aided and abetted Egbert and Dincin in assisting Dunn's suicide. On this record, the district court did not err by denying respondents' motions to dismiss the indictments.

In sum, the provisions in Minn.Stat. § 609.215 criminalizing speech intentionally advising or encouraging another in taking the other's own life are unconstitutional infringements on protected speech. However, the record contains sufficient evidence to establish a reasonable probability that each respondent violated the undisputedly constitutional prohibition on assisting suicide. Accordingly, the district court did not err by denying respondents' motions to dismiss the indictments.

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W.2d, 2013 WL 5418170, 41 Media L. Rep. 2549

Footnotes

1 The grand jury also indicted Dincin on the same charges as Egbert and indicted FEN president Thomas "Ted" Goodwin on charges of aiding and abetting the two primary offenses. Dincin has since died, and the charges against him were dismissed; the district court held that Minn.Stat. § 609.215 is unconstitutional as applied to Goodwin and dismissed the charges against him.

2 The state initiated this pretrial appeal and therefore must demonstrate that the asserted error will have a "critical impact" on the outcome of the case. *State v. Schmidt,* 612 N.W.2d 871, 875 (Minn.2000). Respondents do not dispute that this requirement is satisfied. Because the district court's ruling prompted the district court to dismiss one charge against Massey and reduces the state's case to circumstantial evidence on narrowed charges, we agree.

3 This court rejected a similar constitutional challenge to Minn.Stat. § 609.215 in *State v. Melchert–Dinkel,* 816 N.W.2d 703 (Minn.App.2012), *review granted* (Minn. Oct. 16, 2012), which is currently pending before our supreme court. Accordingly, our decision in *Melchert–Dinkel* has only "minimal precedential value" to our analysis in this case.*Fabio v. Bellomo,* 489 N.W.2d 241, 245 n. 1 (Minn.App.1992), *aff'd,*504 N.W.2d 758 (Minn.1993); *see also Anderson–Johanningmeier v. Mid–Minnesota Women's Ctr., Inc.,* 637 N.W.2d 270, 276 (Minn.2002) (noting that court of appeals is not a court of last resort as to the construction of statutes).

4 The state does not expressly challenge the district court's conclusion that speech encouraging another in taking the other's own life is protected speech. For the sake of clarity, however, we construe the state's argument to encompass both categories of speech.

5 Indeed, review of the history and evolution of criminal laws related to suicide reveals that criminalization of advising or encouraging another in suicide was based on a theory of aiding and abetting the then-crime of suicide. *See Glucksberg,* 521 U.S. at 715–16, 117 S.Ct. at 2264–65.

6 We observe that several other states refer to aiding or facilitating suicide, e.g., N.J. Stat. § 2C:11–6 (West 2005) ("aids"); N.D. Cent.Code Ann. § 12.1–16–04 (West 2012) ("facilitates"), which we consider synonymous with assisting.

7 We further observe that the term "encourages" plausibly encompasses urging speech, but that is not necessarily the same as speech causing another to commit suicide through undue influence or duress-speech that likely would be unprotected speech integral to separate actionable offenses. Consequently, we cannot say that Minn.Stat. § 609.215 addresses this category of speech at all, let alone as part of an overbroad restriction on encouraging speech.

8 The state urges us to construe the statute to prohibit only speech "that intentionally advises a specific person, with the specific intent to aid the person in taking the other person's own life," but acknowledges that the plain language of the statute does not so read.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Tonia Louise DENNISON, Appellant.

No. A03-799.
|
Aug. 10, 2004.

Mower County District Court, File No. K9-02-839.

Attorneys and Law Firms

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Mike Hatch, Attorney General, St. Paul, MN; and Patrick W. Flanagan, Mower County Attorney, Jeremy L. Clinefelter, Assistant Mower County Attorney, Austin, MN, for respondent.

Considered and decided by KALITOWSKI, Presiding Judge; RANDALL, Judge; and WRIGHT, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge.

***1** Appellant challenges her convictions of child neglect and contributing to a child's need for protection or services. She argues that (1) the district court abused its discretion by admitting evidence of her alleged substance addiction; (2) the state committed prejudicial misconduct in closing argument when it relied on character evidence and asked the jury to "send a message"; and (3) the cumulative effect of otherwise harmless errors requires a new trial. We reverse and remand for a new trial.

FACTS

Appellant Tonia Dennison was convicted of two counts of child neglect, a violation of Minn.Stat. § 609.378, subd. 1(a)(1) (2000), and two counts of contributing to a child's need for protection or services, a violation of Minn.Stat. § 260C.425, subd. 1 (2000). The convictions arise out of events from May 7 through May 9, 2002. At the time, appellant and her ex-husband, Jeffrey Dennison, shared joint physical custody of their two children, ten-year-old J.D. and seven-year-old D.D.

On the late afternoon of May 7, the children were at appellant's residence in Austin. According to Jeffrey Dennison, he called appellant's residence shortly after 5:00 p.m. to confirm that J.D. had gone to dance class. D.D. answered and told him that J.D. had not gone that day. When Jeffrey Dennison asked about appellant's whereabouts, D.D. told him that appellant had gone to the store. He called back around 6:40 p.m. J.D. answered and reported that appellant had not yet returned. Jeffrey Dennison then called appellant's boyfriend, Matthew Cain, at his workplace, but Cain did not know appellant's whereabouts.

Jeffrey Dennison called police and reported that the children had been left home alone. He then went to appellant's residence, where both Cain and Officer Eric Blust of the Austin Police Department had recently arrived. In the kitchen, they saw the children using the blender, the stove, and the oven. J.D. later explained that they were hungry and did not know when appellant was going to prepare dinner for them.

After Blust and Jeffrey Dennison talked to the children, Jeffrey Dennison took the children to his mother's residence. Blust left a note for appellant explaining where the children had gone and asking her to call him when she returned. Blust did not receive a response to the note.

Appellant offers this account of her whereabouts: As she was returning from the store on May 7, she saw Blust and Jeffrey Dennison departing with the children but chose not to intervene. Cain and J.D. also claimed to have seen appellant approaching the residence around this time. At her residence, appellant spoke with Cain, but he did not tell her about Blust's note. Afterwards, she placed phone calls to the children and Jeffrey Dennison.

Appellant then went to some bars downtown. She met Cain, who took away her car keys because she was intoxicated.

Appellant spent the night at a friend's house and did not return to her residence until the next day.

*2 On May 8, appellant attempted to pick up her children at school around 3:00 p.m., but they had already departed with their grandmother. Appellant claimed to have parked her car outside the school, but it is unclear whether appellant in fact had her car back. That evening, appellant went out drinking with her friend and returned home.

On May 9, appellant was returning to her residence on foot and ran into her sister, Tina Arndt. When Arndt later recalled the event, she said she thought appellant was not intoxicated. Appellant reached her residence, and officers arrived shortly afterwards.

According to Jeffrey Dennison, he had no contact with appellant from May 7 to May 9. In a call from Cain the evening of May 7, Jeffrey Dennison learned that appellant was downtown drinking and had left her car there overnight. On May 9, Jeffrey Dennison received another call, this time from appellant's mother. She related an account in which Arndt claimed to have seen appellant walking down the road in a delirious and possibly suicidal state. In turn, Jeffrey Dennison reported this information to the Austin Police Department.

Shortly thereafter, Blust and another officer were dispatched to appellant's residence, possibly on Jeffrey Dennison's report. According to Blust, appellant told him that she had been gone for a few days and had been drinking and smoking marijuana.

On May 22, 2002, appellant was charged with child neglect and contributing to a child's need for protection or services. Although the complaint's factual basis recited events from May 7 to May 9, the counts of the complaint only referred to events taking place on May 7. On December 16, 2002, appellant's case proceeded to jury trial.

Jeffrey Dennison's testimony included several references, without defense objection, to appellant's problems with substance abuse and addiction. The first substantial reference occurred in Jeffrey Dennison's direct testimony about his attempts to reach appellant on May 7:
Q: Why is it that you decided to contact [the police] instead of calling the house?

A: Tonia has had a drug addiction. She's been in and out of treatment twice. The second time she went in there, I said, "Get yourself cleaned up. The kids need you. They need a mother."And at that point in time I told her we weren't going to put up with it anymore....

Q: When was the last time she had been in treatment prior to this incident?

A: She didn't finish. She got kicked out of outpatient treatment probably must have been two weeks prior to this. She never really finished either of them.

When Jeffrey Dennison was cross-examined on the events following his arrival at appellant's residence, he added:
A: ... At that point I found she hadn't gone to the store, that she went to pick a person up from treatment in Albert Lea. So then, well, at that point in time, [Cain] came, looked at me and said, "If she's picking a person up for treatment, she's probably into the crack cocaine."

*3 Cross-examination also elicited this exchange:
Q: Had there been any other incidents that raised your concern as to why you contacted law enforcement on May 7th rather than handle it yourself?

A: As I said, she had been in and out of drug dependency. She was in outpatient treatment, got kicked out of that. I told her the kids were getting stressed out about it. I was getting fed up. I decided I was going to do something about it if it ever happened again....

Cain was called as a defense witness. Although appellant did not elicit any testimony about her history of substance addiction on direct, the state cross-examined Cain as follows:
Q: Are you aware of the last time [appellant] had been out of treatment prior to May 7th?

A: Yes.

Q: Was it approximately a week and a half, two weeks before that?

A: I would have to say longer than that.

Q: Are you aware of how many times she's gone through treatment?

A: No, not for sure.

Q: More than once, though, would that be fair to say?

A: Yes.

Q: More than twice?

A: I don't believe she has more than twice, but I'm not sure.

Q: ... Was there ever a time that you were with [appellant] when the girls were around that the two girls saw a package of methamphetamine? [1]

[DEFENSE COUNSEL:] Objection, Your Honor....
[PROSECUTOR:] I withdraw the question, Your Honor.

When appellant later testified, without any discussion of her substance-abuse history on direct, the state cross-examined as follows:
Q: [I]t was your testimony [at a pretrial hearing on June 28, 2002] that you were still in treatment?

A: I was not in treatment anymore, no. The last time I was, was in March.

Q: Let me ask it this way. You were asked [by the state] about any treatment that you had since May 7th.

A: Of this year?

Q: Correct.

A: I haven't had treatment since May 7th of this year, correct.

Q: You have not?

A: Correct.

Q: And you responded [at the pretrial hearing] ... you were hoping to get back into outpatient treatment ... ?

A: I had spoken to [a probation officer].

Q: So you were kicked out of outpatient treatment?

A: I was not kicked out, no....

Q: You did not complete outpatient treatment, correct?

A: I did not complete the outpatient treatment, correct.

Q: This is during the time period of May 7th, correct?

A: No, this was all months before. I was in outpatient treatment in March and I-I went to outpatient and then I started working. It was in and then out and out and then in and I'm not....

Q: And whether or not you complete that outpatient treatment, you were out drinking this evening and the next evening?

A: Yes.

In closing argument, the state again raised the substance-abuse issue. To explain why Jeffrey Dennison called the police on May 7, the state argued,
Why did he want [to call the police]? Why did he come in? Because [appellant] was failing at treatment. She had a substance abuse problem. The girls had a truancy problem. They weren't getting to school. Was it because of the actions of the girls or was it because of the action of [appellant]? It was the action of [appellant].

***4** Did he win those [custody modification] cases? Apparently not. He provided an explanation. He said, "[Appellant] told the court, 'You know what? I'm in treatment. I'm getting my act together.'"

How many times are we going to allow that excuse to pass? By her own testimony this is now [number three]. At what point do we say "No more"? All right. We are going to send you a message. We are going to let you know. You have had your chance. Now you are going to reach this point....

....

If the [family court] considered [appellant] was getting her act together in treatment and getting another chance, and now we are here....

Now, we can argue about the semantics. Was she kicked out of treatment or did she just not go because it didn't work with her schedule? It seems just common sense. You are working

on your outpatient treatment. You are trying to get back in. Going out drinking and disappearing is not the way to do it.

....

We also have the issue ... of the [appellant] talking about the [substance-abuse] therapy. The reason you go to therapy is because there's something going on. I'm asking you to apply the facts as presented.

Appellant's closing statement responded:

> I want you to remember that you are not supposed to find [appellant] guilty because she went through treatment ... or because she never finished outpatient treatment. You are supposed to focus on what happened on May 7th.

Prior to closing statements, the district court read CRIMJIG § 3.11, instructing the jury not to rely on the comments of attorneys as evidence. *See* 10 Minnesota Practice, CRIMJIG § 3.11 (4th ed.1999). The jury found appellant guilty on all counts. This appeal followed.

DECISION

In a criminal case when the defendant fails to preserve an objection at trial, but substantial rights are affected, we review for plain error. *State v. Crowsbreast,* 629 N.W.2d 433, 437 (Minn.2001). Under this standard, there must be an obvious error that affected the defendant's substantial rights. *State v. Griller,* 583 N.W.2d 736, 740 (Minn.1998); *see also United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 1777 (1993). We reverse only if the error " 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " *State v. Strommen,* 648 N.W.2d 681, 686 (Minn.2002) (quoting *Johnson v. United States,* 520 U.S. 461, 466-67, 117 S.Ct. 1544, 1548 (1997)).

The admissibility of character-trait evidence is governed by Minn. R. Evid. 404(a), which provides, in relevant part:
Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same....

With respect to this rule, the Minnesota Supreme Court observed in *State v. Loebach:*" 'No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character.' " 310 N.W.2d 58, 63 (Minn.1981) (quoting *City of St. Paul v. Harris,* 150 Minn. 170, 171, 184 N.W. 840, 840 (1921)).

***5** The *Loebach* court identified three risks underlying the exclusion of character evidence in criminal prosecutions: First, it raises the possibility of conviction based on the suggestion that the defendant is an undesirable person. *Id.* at 63.Second, there is a danger that the jury may accord too much weight to character evidence when assessing the evidence. *Id.* Third, it requires the defendant not only to defend against the criminal charge, but also general allegations of being an undesirable person. *Id.* Because Rule 404(a) excludes evidence of a character trait unless that trait is first called into issue by the defendant, when the defendant in *Loebach* did not introduce evidence that he was a peaceable person, it was error for the prosecution to show that defendant suffered from "battering parent" syndrome and was a violent person. *See id.* at 64.

When substance abuse is not an element of or otherwise at issue with a charged offense, evidence that characterizes the defendant as a substance abuser is inadmissible. *Cf. State v. Walthers,* 620 N.W.2d 727, 728 (Minn.App.2000) (disallowing evidence that the defendant drank alcohol in a prosecution for providing alcohol to a minor); *United States v. Sutton,* 41 F.3d 1257, 1259 (8th Cir.1994) (disallowing evidence of the defendant's substance addiction in a theft case). Noting that it was improper to infer motive from defendant's addiction, the *Sutton* court reasoned, "We cannot say that the slight probative value in knowing one possible motive ... outweighs the likely prejudicial effect on the jury of being told that the defendant was a crack-cocaine user."*Sutton,* 41 F.3d at 1259.

Here, substance use or abuse was neither an element nor an alleged factual basis for the charged offenses. Moreover, appellant never placed her character into issue. The state nevertheless repeatedly introduced evidence of appellant's substance addiction. Furthermore, the inference from this evidence-consistently urged by the state during trial-was that

appellant's substance addiction made her an unfit parent. Because the evidentiary rule at issue here is well settled and the error committed incurs all of the risks identified by *Loebach,* particularly that the jury's decision to convict would be based on appellant's undesirable character, we conclude that the error here is obvious.

When a defendant fails to object to prosecutorial misconduct, we review for plain error. *State v. Johnson,* 672 N.W.2d 235, 240 (Minn.App.2003), *review denied* (Minn. Mar. 16, 1994). Regardless of whether a defendant timely objects, reversal is warranted in cases where the prosecutor's comments are "unduly prejudicial." *State v. Whittaker,* 568 N.W.2d 440, 450 (Minn.1997).

Prosecutorial misconduct occurs when the state appeals to passion or prejudice and distracts the jury from deciding the issue of proof beyond a reasonable doubt. *State v. Ashby,* 567 N.W.2d 21, 27 (Minn.1997). When misconduct is alleged, the defendant cannot rely on a few isolated statements; the misconduct must be considered in the context of the parties' arguments and the entire trial. *State v. Powers,* 654 N.W.2d 667, 678-79 (Minn.2003).

***6** In criminal prosecutions, "the jury's role is not to enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth.' " *State v. Salitros,* 499 N.W.2d 815, 819 (Minn.1993). Thus, misconduct occurs when a prosecutor urges the jury to protect society, *State v. Duncan,* 608 N.W.2d 551, 556 (Minn.App.2000), *review denied* (Minn. May 16, 2000), or to hold the defendant "accountable," *Salitros,* 499 N.W.2d at 820. Here, the state asked the jury to "send a message" and argued that appellant "had her chance." This line of argument is nearly indistinguishable from others that have been held to be prosecutorial misconduct. *See Salitros,* 499 N.W.2d at 820;*see also State v. Montjoy,* 366 N.W.2d 103, 109-10 (Minn.1985) (dicta). In the context of a plain-error analysis, this error is obvious.

For plain-error analysis, an error also must affect the defendant's substantial rights. *Griller,* 583 N.W.2d at 740. The errors here present a significant likelihood of prejudice, but we do not conclude that either error by itself influenced the outcome of the case. *See State v. Ihle,* 640 N.W.2d 910, 916 (Minn.2002).

Under some circumstances, the cumulative effect of multiple harmless errors may deny a fair trial and therefore require reversal for a new trial. *State v. Litzau,* 650 N.W.2d 177, 180 (Minn.2002). When determining whether reversal is appropriate, we balance the egregiousness of the errors against the weight of proof against the defendant. *See State v. Cermak,* 350 N.W.2d 328, 334 (Minn.1984).

The instant case involves two serious errors, compounded over the course of trial, which exposed the jury to improper and prejudicial evidence.[2] Even if each error in isolation is harmless, their cumulative effect compromised the integrity of the proceeding and denied appellant a fair trial. We, therefore, conclude that reversal and remand for a new trial are warranted.

Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2004 WL 1775578

Footnotes

1 The record does not disclose whether appellant has any prior history involving methamphetamine.

2 Other aspects of the evidence in this case also are troubling. We observe that, even though the complaint only alleges offenses occurring on May 7, the district court allowed evidence of subsequent events occurring on May 8 and 9. *See generally State v. Gisege,* 561 N.W.2d 152, 156 (Minn.1997). Although defense counsel did not object, many of these events are established by testimony that may constitute inadmissible hearsay. *Cf. State v. Jackson,* 655 N.W.2d 828, 833 (Minn.App.2003), *review denied* (Minn. Apr. 15, 2003).

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Dennis Joseph PEARSON, Appellant.

No. A04-1632.
|
Sept. 6, 2005.
|
Review Granted/Reversed Dec. 13, 2005.

Hennepin County District Court, File No. 04003703.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Amy Klobuchar, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, MN, for respondent.

John M. Stuart, State Public Defender, Bridget Kearns Sabo, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by MINGE, Presiding Judge; LANSING, Judge; and HALBROOKS, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant challenges his convictions of criminal sexual conduct and contributing to the delinquency of a child, arguing that the district court (1) abused its discretion by admitting *Spreigl* evidence relating to other crimes committed by appellant, and (2) erred by imposing both upward durational and upward dispositional departures to his sentence, in violation of *Blakely*.Appellant further argues that even if *Blakely* does not apply to upward dispositional departures, the district court erred because there were no substantial and compelling aggravating factors to justify the departure. In a pro se supplemental brief, appellant contends that (1) he received ineffective assistance of counsel, (2) his home was searched under an illegal search warrant, and (3) his trial should have been held in a different county. Because we conclude that the district court did not err by admitting the *Spreigl* evidence or by imposing an upward dispositional departure, we affirm in part. But because the imposition of an upward durational departure violated appellant's Sixth Amendment right to a jury, we reverse in part and remand. We further conclude that appellant's pro se arguments are without merit.

FACTS

On the evening of January 15, 2004, F.F., a 15-year-old female, visited appellant Dennis Pearson's apartment with a male friend. F.F. sat down on appellant's couch and appellant soon offered F.F. "something to drink," which she declined because, as she explained to him, she did not drink alcohol. Appellant persisted and F.F. eventually consumed "[a]bout four glasses" of vodka. F.F. testified that she "didn't like [the drink, but that appellant] kept pouring more into [her] glass."After drinking the vodka, F.F. stated that she felt sick. F.F. and her friend then left the apartment "to go buy some weed" and returned to appellant's apartment afterwards. Appellant offered F.F. more to drink, but F.F. declined because she was not feeling well and felt like she "was about to vomit or something."While F.F. was in the apartment, there was a pornographic movie playing that depicted "[n]aked people .... [h]aving sex."

F.F. then testified to the following:
Q: Did [appellant] say anything else to you or do anything else at that time that you were sitting at the edge of the couch?

A: He sat next to me.

Q: Okay. And was he doing anything?

A: Yes.

Q: What was he doing?

A: He was-he put his hand on my thigh and just was rubbing me, and I kept pulling his arm away.

....

Q: Okay. After he was rubbing your thigh what did he do?

A: He put his hand on my belly, and there is a point he touched my breast also.

F.F. asked appellant to stop, but he refused. F.F. also testified that appellant "brought [his penis] out" and masturbated in front of her. Appellant proceeded to show F.F. photographic images of his genitalia and "bragg[ed] about it." F.F. then vomited on appellant's floor. F.F. testified that appellant touched her "inappropriately" and that she could feel "his fingertips going down [her] skirt," while she was vomiting. Soon after, the police arrived and F.F. was taken to the emergency room. [1]

***2** Officer Tammy Persoon arrested appellant for furnishing alcohol to a minor. Officer Persoon testified that appellant was wearing a black trench coat and that his genitals were exposed. When she searched appellant, Officer Persoon found four Polaroid photographs in his front pocket. F.F. testified that the seized photographs were consistent with the ones that appellant had shown her earlier in the evening. Nearly two months later, on March 11, 2004, a warrant was issued to search appellant's apartment for "sexually explicit material," among other things.

By amended complaint filed March 31, 2004, the state charged appellant with one count of fourth-degree criminal sexual conduct, in violation of Minn.Stat. § 609.345, subds. 1(b), 2 (2002); two counts of fifth-degree criminal sexual conduct, in violation of Minn.Stat. § 609.3451, subds. 1(1), 2, 3 (2002); and one count of contributing to the delinquency of a child, in violation of Minn.Stat. § 260B.425, subd. 1(a) (2002). Appellant pleaded not guilty to all charges and demanded a speedy trial.

Prior to trial, the state filed a *Spreigl* notice, explaining that it "intend[ed] to show and will seek to prove ... that [appellant] has been guilty of additional crimes and misconduct [in the past]." The state offered two prior offenses, from 1997 and 2001, to "show [ ] that [appellant had] a common scheme or plan in that he seeks out young juvenile girls. He shows them Polaroid photos of his genitals, he exposes his genitals to them while talking to them, commenting on their looks."After presentation of the state's other witnesses, the district court found weakness in the state's case because F.F. could not identify appellant in court. The district court also found similarity between the conduct alleged in the previous incidents, but denied admission of the 1997 incident as being too remote in time. The district court permitted introduction of evidence from the 2001 incident and allowed the female victim, R.K., to testify.

R.K. testified that appellant, wearing a trench coat with his genitals exposed, knocked on her door and "asked for someone." When R.K. told appellant that "that person [doesn't] live here, [appellant] started to come up the stairs towards" R.K. She ran to her father, who chased appellant away. R.K. also explained that on another occasion, she had seen appellant at the bus stop and that "he was reading a porn magazine and ... talking about his magazine and stuff like that."At the bus stop, appellant was wearing a trench coat and R.K. was able to see his genitals because "it kept poking out." R.K. identified appellant in court.

A jury found appellant guilty of all counts alleged in the complaint. Appellant's presentence-investigation report calculated the presumptive sentence for fourth-degree criminal sexual conduct to be a stayed sentence of 18 months. The state moved for an upward dispositional and a double durational sentencing departure. At sentencing, the district court noted that appellant had engaged in "consistent conduct for almost 20 years" and that his "offense conduct has now escalated." Departing upward, the court explained:

***3** I find that there [are] substantial and compelling circumstances to depart. I find that a dispositional departure is appropriate. [The presumptive sentence would] continue the absurdity of your past sentencing.

... I also find that a [durational] departure upward is also appropriate. That this is a more serious offense based on the fact that you created the vulnerability of a 15-year old victim and then you exploited it. For that reason I'm going to upwardly depart.

The court imposed a prison sentence of 24 months and a five-year supervised-release period, pursuant to the conditional-release statute. This appeal follows.

DECISION

I. *Spreigl* Evidence

Appellant first argues that the district court erred by admitting irrelevant and prejudicial evidence relating to other crimes

committed by appellant. Such evidence of other crimes or bad acts has been characterized as *Spreigl* evidence by Minnesota courts. *State v. Kennedy,* 585 N.W.2d 385, 389 (Minn.1998). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth,* 552 N.W.2d 187, 193 (Minn.1996). In order to prevail, appellant has the burden to show error and prejudice resulting from the error. *State v. Loebach,* 310 N.W.2d 58, 64 (Minn.1981).

In general, *Spreigl* evidence is not admissible to prove that a criminal defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl,* 272 Minn. 488, 495-96, 139 N.W.2d 167, 171-72 (1965). But the evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.Minn. R. Evid. 404(b); *Spreigl,* 272 Minn. at 491, 139 N.W.2d at 169. The supreme court recently summarized the law surrounding the admission of *Spreigl* evidence:
The overarching concern is that the evidence might be used for an improper purpose, such as suggesting that the defendant's prior bad acts show that he has a propensity to commit the present bad acts, or that the defendant is a proper candidate for punishment for his past acts. *Spreigl* evidence should complete the picture of a defendant, not paint another picture.

Given these special concerns surrounding use of *Spreigl* evidence, the state bears the burden for securing its admissibility by (1) providing notice that the state intends to use the evidence, (2) clearly indicating what the evidence is being offered to prove, (3) offering clear and convincing proof that the defendant participated in the other offense, (4) proving that the *Spreigl* evidence is relevant and material to the state's case, and (5) proving that the probative value of the *Spreigl* evidence is not substantially outweighed by its potential for unfair prejudice.

State v. Washington, 693 N.W.2d 195, 200-01 (Minn.2005) (citations and quotations omitted). If it is unclear whether *Spreigl* evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded. *Kennedy,* 585 N.W.2d at 389. Appellant concedes that the first three prongs for admissibility have been met, but challenges the relevance and probative value of the *Spreigl* evidence.

A. Relevance and Materiality

***4** Appellant argues that the 2001 *Spreigl* evidence should not have been admitted because it was irrelevant and immaterial to the state's case, being wholly distinct from the current charge and not reflecting a common plan or modus operandi. When determining the relevancy and materiality of *Spreigl* evidence, the district court "should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place, or modus operandi."*State v. Courtney,* 696 N.W .2d 73, 83 (Minn.2005). The *Spreigl* incident need not be identical with the charged offense if other factors indicate clear relevancy. *Washington,* 693 N.W.2d at 203.

Here, by admitting the other-crimes evidence, the district court specifically found similarity between the 2001 incident and the charged offense. There is no question that the incidents are sufficiently close in time and place-both having occurred in the past few years within the city of Minneapolis. And while the incidents do not reflect an identical modus operandi, they are sufficiently similar. For example, on both occasions, appellant exposed his genitals to underage girls while wearing a trench coat and viewing pornography (in one instance a magazine, and in the other, a movie). While one of the 2001 incidents occurred in a public place (a bus stop) and the charged offense here occurred in private quarters (appellant's own apartment), such a distinction does not deprive the incidents of sufficient similarity to be relevant. [2] *See Kennedy,* 585 N.W.2d at 391 (explaining that *Spreigl*-evidence events "need not be identical in every way to the charged crime, but must instead be sufficiently or substantially similar to the charged offense"). Accordingly, the district court did not abuse its discretion by admitting the 2001 incident as relevant and material to the state's case against appellant.

B. Unfair Prejudice

Appellant further argues that even if the evidence of other crimes was marginally relevant to the case against appellant, its prejudicial effect outweighs its probative value. As the supreme court has explained, "[e]ven relevant and material *Spreigl* evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice."*Washington,* 693 N.W.2d at 203.

When balancing the probative value against the prejudicial effect of *Spreigl* testimony, the district court "must consider how necessary the *Spreigl* evidence is to the state's case. Only

if the other evidence is weak or inadequate, and the *Spreigl* evidence is needed as support for the state's burden of proof, should the [district] court admit the *Spreigl* evidence."*State v. Berry,* 484 N.W.2d 14, 17 (Minn.1992) (citations omitted). Necessity has been clarified by the supreme court:

> "Need" for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

***5** *Angus v. State,* 695 N.W.2d 109, 120 (Minn.2005) (quoting *State v. Bolte,* 530 N.W.2d 191, 197 n. 2 (Minn.1995)). To accomplish this task, the district court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant."*Angus,* 695 N.W.2d at 120. These considerations should be addressed only after the state has offered all of its non-*Spreigl* evidence. *Kennedy,* 585 N.W.2d at 392.

Here, the district court properly considered the state's *Spreigl* evidence after the state presented its other witnesses. In addition, the district court specifically characterized the state's case as "weak[ ]" because the complaining witness, F.F., "did not identify" appellant and further found that "[i]dentity [is] the central issue in this case."While the district court did not further elaborate on its characterization of the state's case as "weak," the record suggests that F.F. was extremely intoxicated during the evening in question, ultimately vomiting from consuming an excessive amount of vodka. Appellant claims that his identity was never seriously in doubt because F.F. referred to him by name in her testimony and other witnesses identified the apartment in question as appellant's. But these observations do not alter the fact that F.F. was the one who testified to appellant's acts and that she was unable to make an in-court identification of the perpetrator. In addition, F.F.'s intoxication and its potential impact on her capacity to perceive and recall events arguably weakens her testimony, thereby making the state's *Spreigl* evidence necessary in order for it to sustain its burden of proof.

In sum, because (1) the prior offense as testified to by the *Spreigl* witness was substantially similar to the charged offense and was therefore relevant and material to show appellant's common scheme or plan and (2) the testimony's prejudicial effect did not outweigh its probative value, we conclude that the district court did not abuse its broad discretion by admitting the state's *Spreigl* evidence.

II. Upward Durational Departure

Appellant next argues that the district court's upward durational departure [3] warrants reversal because it was based on a fact found by the court-and not the jury-in violation of *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531 (2004). As a preliminary matter, although appellant was found guilty and sentenced before *Blakely* was decided, he is entitled to a review of his sentence in light of *Blakely* because it is a new rule of constitutional criminal procedure that was announced while appellant's direct appeal was pending. [4] *See O'Meara v. State,* 679 N.W.2d 334, 339 (Minn.2004). The application of *Blakely* presents a constitutional issue, which we review de novo. *State v. Hagen,* 690 N.W.2d 155, 157 (Minn.App.2004).

In *Blakely,* the Supreme Court held that the sentencing judge may not impose a sentence greater than "the maximum sentence [that may be imposed] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."124 S.Ct. at 2537 (emphasis omitted). The Court held that an upward durational departure could not be imposed based on judicial findings alone. *Id.* at 2537-38.In *Blakely,* the Supreme Court reversed and remanded the 90-month "exceptional sentence" that had been imposed under Washington State's determinate sentencing scheme. *Id.* at 2543.

***6** *Blakely* applies to upward durational departures under the Minnesota Sentencing Guidelines. *State v. Shattuck,* 704 N.W.2d 131, ----, 2005 WL 1981659, at *8 (Minn. Aug. 18, 2005). In Minnesota, *Blakely* requires that factual findings supporting an upward durational departure from the presumptive guidelines sentence must be found by a jury, admitted by the defendant, or found by the district court with the defendant's consent. *Id.*

Here, the district court based its upward durational departure on its finding that appellant "created the vulnerability of a 15-year old victim and then [ ] exploited it." [5] Because appellant did not admit that F.F. was a particularly vulnerable victim or waive his right to a jury determination of that aggravating

factor, appellant's sentence violated his Sixth Amendment rights under *Blakely*. We therefore reverse and remand for sentencing in accordance with the dictates of *Blakely*.

III. Upward Dispositional Departure

A. Application of *Blakely*

Appellant also argues that the district court's upward dispositional departure [6] similarly warrants reversal because it was based on the district court's finding-and not the jury's finding-that appellant was not amenable to probation, thereby violating *Blakely*. Again, the application of *Blakely* presents a constitutional issue, which we review de novo. *Hagen,* 690 N.W.2d at 157.

At sentencing, the district court made the following finding of unamenability to probation:

> I also take into consideration, not only your prior record ... I also consider that you have had a number of opportunities to try and get this together. You've had a number of probation opportunities, and ... [the] presentence investigation report is littered with revocations. I also take into account that you were on probation when this offense occurred, for three offenses I believe, which to me borders on absurdity.

Based on these factors, the court imposed an upward dispositional departure.

Appellant argues that the district court's finding of unamenability was a "fact" within the meaning of *Blakely*. But this court has already held that, unlike its application to durational departures, *Blakely* does *not* apply to upward dispositional departures. *State v. Hanf,* 687 N.W.2d 659, 665-66 (Minn.App.2004), *review granted* (Minn. Dec. 14, 2004). [7] In *Hanf,* we reasoned:

[A]n offender's amenability or unamenability to probation is not a "fact," within the meaning of *Apprendi,* that increases the offender's penalty. A dispositional departure requiring an offender to go to prison is undoubtedly a greater penalty than probation. But an offender's unamenability to probation is a judgment reached after consideration of a series of facts. It is not a "fact necessary to constitute the crime," but rather a strictly offender-related conclusion.

Id. at 665 (citations omitted). We concluded that "the determination of amenability or unamenability to probation is not the determinate, structured fact-finding that *Blakely* holds the jury must perform." *Id.*

*7 Nonetheless, appellant urges that the distinction we have made between offense-related facts and offender-related facts is without support in the caselaw. Appellant also asks this court to "reconsider" our previous rulings on the issue of dispositional departures in light of *Blakely*. Because the supreme court has already granted review in *Hanf,* we decline appellant's invitation to reconsider our decision. [8] And because the upward dispositional departure imposed here fits within the *Hanf* mold of dispositional departures based on offender-related characteristics rather than offense-related aggravating factors, we reject appellant's *Blakely* challenge to his dispositional departure and affirm the district court in that respect.

B. Substantial and Compelling Aggravating Factors To Depart Upward

Appellant argues that even if *Blakely* does not apply to upward dispositional departures, there are no substantial and compelling aggravating factors to support the departure imposed here. The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Givens,* 544 N.W.2d 774, 776 (Minn.1996).

The procedure for reviewing an upward departure is well established:

1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.

2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.

3. If the reasons given justify the departure, the departure will be allowed.

4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.

5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

State v. Geller, 665 N.W.2d 514, 516 (Minn.2003) (emphasis omitted) (quoting *Williams v. State,* 361 N.W.2d 840, 844 (Minn.1985)). When considering a dispositional departure, the district court should evaluate "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family."*State v. Trog,* 323 N.W.2d 28, 31 (Minn.1982).

Appellant argues that the district court did not properly consider all the *Trog* factors. But *Trog* does not mandate an exhaustive evaluation of all its factors on the record. *See id.*(recognizing factors that a district court *may* consider in granting a dispositional departure). Moreover, even if the reasons given here were improper or inadequate, if "there is sufficient evidence in the record to justify departure, the departure will be affirmed."*Williams,* 361 N.W.2d at 844. A review of the record reveals that there is more than enough evidence to conclude that appellant is unamenable to probation, especially given appellant's criminal history and numerous probation violations. Accordingly, the district court did not abuse its discretion by dispositionally departing upward.

IV. Pro Se Arguments

***8** In his pro se supplemental brief, appellant claims that (1) he received ineffective assistance of counsel at trial, (2) his home was the subject of an illegal search warrant, and (3) his trial should have been moved to a different county because of "prejudice." Appellant offers these points with little or no citation to the record or applicable law. *See State v. Krosch,* 642 N.W.2d 713, 719 (Minn.2002) (holding that issues not supported by argument or citation to legal authority are deemed waived). We normally decline to reach issues that are not briefed adequately. *Broehm v. Mayo Clinic Rochester,* 690 N.W.2d 721, 728 (Minn.2005). Nor will we address claims that are unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.,* 512 N.W.2d 918, 919 n. 1 (Minn.App.1994). Nevertheless, we address each of appellant's pro se claims here.

A. Ineffective Assistance of Counsel

Appellant argues that he received ineffective assistance of counsel at his trial "because of [his attorney's] overall lack of diligence, communication, thoroughness and preparation."Whether a representation rises to the level of ineffective assistance of counsel is one of constitutional law, which we review de novo. *State v. Blom,* 682 N.W.2d 578, 623 (Minn.2004).

In order to meet his burden in an ineffective-assistance-of-counsel claim, appellant
must affirmatively prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[ ][ ]A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Gates v. State, 398 N.W.2d 558, 561 (Minn.1987) (quoting *Strickland v. Washington,* 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068 (1984)). This court need not address both elements "if the defendant makes an insufficient showing on one."*Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069. In addition, the Minnesota Supreme Court has explained that "[w]hat evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."*State v. Voorhees,* 596 N.W.2d 241, 255 (Minn.1999).

At the sentencing hearing, appellant listed a number of perceived defects in the legal representation he received, including his attorney's (1) lack of communication, (2) lack of investigation, (3) failure to explain "the seriousness of" the amended complaint, (4) failure to challenge the evidence seized from his apartment as an illegal search, and (5) failure to give an opening statement or cross-examine certain witnesses. [9] Appellant has broadly characterized his counsel's representation as "incompetent." Addressing appellant at sentencing, the district court explained, "I observed what went on in this courtroom. If I had ever thought, even for one moment[,] that you were not being effectively represented, I would have stepped in."In response to appellant's challenge to his attorney's trial strategy, the district court said, "if I had represented you, I would have not opened. Not under the circumstances. I would not have cross-examined [F.F.] under the circumstances."

***9** We agree. Many of appellant's allegations describe the kind of "trial tactics which lie within the proper

discretion of trial counsel and will not be reviewed later for competence."*Voorhees,* 596 N.W.2d at 255. In addition, a review of the record before us reveals that appellant's other ineffective-assistance claims are unsubstantiated and without merit.

B. Search Warrant

Appellant also claims that his apartment was searched pursuant to an illegal search warrant and questions whether the items seized were "contaminated" or whether there was probable cause for a search warrant. This court reviews a district court's determination of probable cause to issue a search warrant to ensure that there was a substantial basis for the issuing judge to conclude that probable cause existed. *State v. Harris,* 589 N.W.2d 782, 787-88 (Minn.1999). Substantial basis in this context means a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place."*State v. Zanter,* 535 N.W.2d 624, 633 (Minn.1995) (quotation omitted).

A district court issued a search warrant on March 11, 2004, almost two months after the alleged incident in this case. Probable cause on which a valid search warrant may be based must exist at the time the warrant is issued, not at some earlier time. *United States v. Steeves,* 525 F.2d 33, 37 (8th Cir.1975); *see also Gerdes v. State,* 319 N.W.2d 710, 713 (Minn.1982). Thus, the inquiry is whether probable cause to search appellant's apartment existed in March 2004, nearly two months after the alleged incident.

The issuing judge found probable cause to search appellant's home because the property (1) "was used as [a] means of committing a crime" and (2) "constitute [d] evidence which tend[ed] to show a crime ha[d] been committed, or tend[ed] to show that a particular person ha[d] committed a crime."The warrant sought to retrieve, among other things, evidence depicting "sexually explicit material." Because certain pornographic images were implicated in the case against appellant, a "fair probability [existed] ... that contraband or evidence of a crime [would] be found" in appellant's home. *Zanter,* 535 N.W.2d at 633. In addition, any concerns about spoliation or contamination of evidence are remedied by the fact that appellant's apartment was not occupied from the time he was arrested until the warrant was executed because appellant himself was incarcerated. Appellant's claim that maintenance workers were inside his property during that time is unavailing.

C. Venue

Finally, appellant asserts that his trial in Hennepin County was "with prejudice" because of his "so called illegal past behavior and the past unethical and/or illegal actions taken by the legal system" against him. Because of this, appellant requests a new trial outside the Twin Cities area-essentially making a postconviction change-of-venue request.

***10** Because appellant did not request a change of venue before the district court, the issue is not properly before this court. *See Roby v. State,* 547 N.W.2d 354, 357 (Minn.1996) (explaining that appellate courts will generally not consider matters not argued and considered by the district court). But in criminal cases, this court may consider issues raised for the first time in pro se supplemental briefs. *See Dale v. State,* 535 N.W.2d 619, 624 (Minn.1995). Regardless, it is clear that a request for a change in venue cannot be granted merely because a criminal defendant has had extensive contact with the criminal-justice system in a particular jurisdiction. In addition, because appellant cannot demonstrate any kind of specific prejudice suffered because his trial was held in Hennepin County, his change-of-venue argument is meritless.

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W.2d, 2005 WL 2127467

Footnotes

1 F.F.'s brother previously spoke to F.F. on the telephone and testified that she was "scared" and "crying." In response, he went to appellant's floor and telephoned the police, who arrived 10-15 minutes later.

2 In addition, the victim of the 2001 incident also testified that appellant appeared at her private residence naked and that he "started to come up the stairs toward[s]" the victim.

3 Durational departures are based on characteristics of the charged offense. *State v. Chaklos,* 528 N.W.2d 225, 228 (Minn.1995).

4 At his sentencing hearing on June 2, 2004, appellant made it clear that he intended to appeal his sentence on a number of grounds.

5 The district court also stated that appellant "created a vulnerability by giving [the victim] alcohol, by repeatedly filling her glass and encouraging her to drink it, and then once she was vulnerable and helpless, [appellant] exploited that for [his] own sexual gratification."

6 Dispositional departures are based on characteristics of the offender himself. *See generally Chaklos,* 528 N.W.2d at 228.

7 Hanf's petition for further review was stayed pending final disposition in *Shattuck* and *State v. Allen,* No. A04-127, 2004 WL 1925881 (Minn.App. Aug. 31, 2004), *review granted* (Minn. Nov. 16, 2004).

8 Appellant argues that *Hanf* is not binding on this court because the supreme court has granted further review. But until the supreme court issues its decision, we will continue to follow the holding announced by this court in *Hanf* for purposes of consistency.

9 At the sentencing hearing, appellant alleged his counsel "spent less than 25 minutes with [him] before the original trial date" and had "very little communication" with appellant during the trial on April 6-9, 2004.

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2007 WL 2102437
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Scott W. LENTZ, Appellant.

No. A06-723.
|
July 24, 2007.
|
Review Denied Oct. 16, 2007.

Steele County District Court, File No. K7-05-1165.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, and Douglas L. Ruth, Steele County Attorney, Daniel A. McIntosh, Assistant County Attorney, Owatonna, MN, for respondent.

John M. Stuart, State Public Defender, Lydia Villalva Lijó, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by MINGE, Presiding Judge; WRIGHT, Judge; and WORKE, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

***1** On appeal from convictions of contributing to the delinquency of a minor, appellant argues that the district court committed plain error that affected his fundamental rights in instructing the jury. We affirm.

DECISION

Appellant Scott Wilton Lentz challenges the district court's jury instructions. Generally, we review the adequacy of jury instructions for an abuse of discretion. *State v. Peou,* 579 N.W.2d 471, 475 (Minn.1998). The district court "has considerable latitude in the selection of the language of a jury charge ... [but] a jury instruction must not materially misstate the law."*State v. Pendleton,* 567 N.W.2d 265, 268 (Minn.1997)."[T]he court's charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error."*Peou,* 579 N.W.2d at 475. But appellant failed to object to the now-challenged instruction. While objections not made at trial are waived on appeal, we may address the issue "if the instructions contain plain error affecting substantial rights or an error of fundamental law."*State v. Earl,* 702 N.W.2d 711, 720 (Minn.2005); *see also*Minn. R.Crim. P. 2603, subd. 18(3).

Here, appellant provided alcohol to 14- and 15-year-old minors who were cited for underage drinking. A jury convicted appellant of four counts of contributing to the delinquency of a minor, under Minn.Stat. § 260B.425, subd. 1(a) (2004), which states that "[a]ny person who by act, word, or omission encourages, causes, or contributes to delinquency of a child or to a child's status as a juvenile petty offender, is guilty of a gross misdemeanor."Under this statute, the state is required to prove that: (1) the children were under 18 years of age; (2) the defendant by act, word, or omission encouraged, caused, or contributed to the need for protection services, delinquency of the children, or the status of the children as juvenile petty offenders; and (3) the defendant's act took place at a particular time and location. 10 *Minnesota Practice,* CRIMJIG 13.100 (1999).

Appellant argues that the district court's jury instruction that "a person under 18 years of age who consumes alcohol is a juvenile petty offender" relieved the state of proving an element of the crime because only a court can adjudicate whether someone is a juvenile petty offender. The state counters that the district court merely summarized applicable law because (1) Minn.Stat. § 260B.007, subd. 16(d) (2004), states that "[a] child who commits a juvenile petty offense is a 'juvenile petty offender' "; (2) Minn.Stat. § 260B.007, subd. 3 (2004), states that "child" means "an individual under 18 years of age"; (3) Minn.Stat. § 260B.007, subd. 16(a) (2004), states that a " '[j]uvenile petty offense' includes a juvenile alcohol offense"; (4) Minn.Stat. § 260B.007, subd. 17 (2004), states that a " '[j]uvenile alcohol offense' means a violation by a child of any provision of [Minn.Stat. § 340A.503]," which includes a prohibition against any "person under the age of 21 years ... consum[ing] any alcoholic beverages," Minn.Stat. § 340A.503, subd. 1(a)(2) (2004). We agree with the state that the district court did not misstate the law, but permissibly

summarized it as applicable to the case at hand. *See State v. Backus,* 358 N.W.2d 93, 95 (Minn.App.1984) ("It is desirable for the court to explain the elements of the offenses rather than simply reading statutes.").

***2** Appellant contends that an adjudication of the children as juvenile petty offenders is required in order to proceed with the prosecution against him. *But see State v. Hayes,* 351 N.W.2d 654, 657 (Minn.App.1984) ("An adjudication of delinquency ... is not necessary for a prosecution of contributing to the delinquency of a minor."), *review denied* (Minn. Sept. 12, 1984). Here, the state had to prove that the children were under the age of 18 and consumed alcohol. Once the state proved these elements, the children were, for the purposes of appellant's trial, juvenile petty offenders. Even though a court had not adjudicated the children as juvenile petty offenders, the jury in appellant's case was required to determine that the factors necessary to adjudicate the children as such had been satisfied. In so doing, the jury concluded that, for the purposes of appellant's case, the children were juvenile petty offenders; the district court did not conclude the status nor did it direct the jury to do so. On this record, a separate adjudication of the children as juvenile petty offenders is unnecessary to proceed in a prosecution of contributing to the delinquency of a minor. The district court's summary of the law did not alleviate the state's burden and was not plain error affecting appellant's substantial rights.

Affirmed.

All Citations

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2006 WL 923526
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Lennon Virgil HUGHART, Respondent.

No. A05–1196.
|
April 11, 2006.

Goodhue County District Court, File No. K7–03–1428.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and Stephen N. Betcher, Goodhue County Attorney, Erin L.K. Schmickle, Assistant County Attorney, Red Wing, MN, for appellant.

Mark D. Nyvold, St. Paul, MN, for respondent.

Considered and decided by WRIGHT, Presiding Judge; DIETZEN, Judge; and WORKE, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge.

***1** Appellant State of Minnesota challenges the district court's imposition of a sentence that constitutes a downward dispositional departure, arguing that the district court impermissibly relied on victim-related factors and social factors to support its determination that substantial and compelling circumstances justify the departure. Because the district court's findings are insufficient to facilitate effective appellate review, we reverse and remand.

FACTS

In July 2003, respondent Lennon Hughart called the younger sister of one of his friends and asked her to meet him to smoke marijuana. The girl, who had just turned 12 years old, agreed to meet Hughart at his home. The two smoked marijuana together, drove around, and then had sex. Hughart was 21 years of age. A jury subsequently convicted Hughart of first-degree criminal sexual conduct, a violation of Minn.Stat. § 609.342, subd.1(a) (2002), [1] second-degree criminal sexual conduct, a violation of Minn.Stat. § 609.343, subd. 1(a) (2002), [2] and contributing to the delinquency of a minor, a violation of Minn.Stat. § 260B.425 (2002). [3]

The defense moved for downward durational and dispositional departures, arguing that Hughart is particularly amenable to probation and that he lacked substantial capacity for judgment at the time of the offense under the Minnesota Sentencing Guidelines. Minn. Sent. Guidelines II.D.2(a)(5) (amenability to probation), II.D.2(a)(3) (substantial capacity for judgment).

The district court found that section II.D.2(a)(3) did not apply but granted the defense motion for a dispositional departure under section II.D.2(a)(5). The district court imposed the presumptive 144–month sentence for the first-degree criminal sexual conduct conviction but stayed execution of the sentence and placed Hughart on probation. The district court imposed the presumptive 21–month sentence for the second-degree criminal sexual conduct conviction to be served concurrently but again stayed execution of the sentence. The district court imposed a fine for the conviction of contributing to the delinquency of a minor. This appeal followed.

DECISION

The state argues that the district court impermissibly relied on victim-related factors and social factors when it found substantial and compelling circumstances to justify its departure. In addition, the state maintains that, even if the district court relied on amenability to probation, a permissible factor, the record does not support a finding that Hughart is amenable to probation.

On appeal, we review the district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *State v. Geller,* 665 N.W.2d 514, 516 (Minn.2003). Unless a case involves substantial and compelling circumstances warranting a departure, a district court should impose the presumptive guidelines sentence. Minn. Sent. Guidelines II.D. "When departing from the presumptive sentence, a judge must provide written reasons

which specify the substantial and compelling nature of the circumstances" justifying the departure. Minn. Sent. Guidelines II.D. The district court also must articulate reasons for the departure on the record at the sentencing hearing and in its departure report. *Williams v.. State,* 361 N.W.2d 840, 843–44 (Minn.1985). When sentencing a defendant for criminal sexual conduct, a district court "may depart dispositionally from the presumptive sentence and place the defendant on probation only if the defendant is particularly amenable to probation or if offense-related mitigating circumstances are present."*State v. Love,* 350 N.W.2d 359, 361 (Minn.1984).

***2** At the sentencing hearing, the district court first described certain factors that it believed mitigated Hughart's culpability. Specifically, the district court stated:

> [I] would be remiss in not drawing attention to the fact that in this case the defendant and the victim, the victim's sister who testified at trial, are all products of a very similar environment. It's an environment which has been created largely because of an inordinate amount of money made available. And again, I heard this firsthand from the testimony at trial in the summer of '03, a lot of unsupervised free time for young people. And I want to make it clear that this is something that cuts across any type of racial line or otherwise. It's not speaking to any type of particular culture. It speaks to young people that, as I said, have access to a lot of money and a lot of free time regardless of age and ability to handle it wisely. With those circumstances come the inevitable presence of drugs. And I listened to the testimony that the activity of the day, and of the week, and of the month would be to get high and hang out. Either drink, smoke, ingest in some way or another.
>
> Well you don't have to be ... a whiz to contemplate what comes out of those kinds of circumstances. Certainly sexual behavioral, wrongful sexual behavior, sometimes violent but certainly not appropriate sexual behavior, is going to occur given those circumstances. And I think ultimately that's, to a large extent, what came about here.
>
> ....
>
> [I]t appeared rather clearly that the victim in this instance found that her direction was to follow that of her sisters, hang out with them, and I can only assume partake in the same social agenda that I described earlier. And again, I believe that this background, this context if you will, is the one in which the defendant and the victim in this case got together one early morning and the defendant committed the illegal act.
>
> And I, as a result of that, have come to the conclusion that ... there are substantial grounds which mitigate the offender's culpability. Although certainly not arising to the legal defense for what the defendant did.

But a district court may not rely on social or economic factors to justify a sentencing departure. Minn. Sent. Guidelines II.D.1; *see also State v. Solomon,* 359 N.W.2d 19, 22 (Minn.1984) (noting that social and economic factors may not be considered except indirectly as part of an amenability to probation analysis). We, therefore, agree with the state that the district court's discussion of the social and economic environment on the Prairie Island Indian Reservation, as well as the district court's reference to the victim modeling her older sisters' behavior, was improper.

Despite these improper references, we have the authority to affirm the district court's sentencing departure if the district court clearly articulates a proper alternative basis for departure. *State v. Dixon,* 415 N.W.2d 414, 418 (Minn.App.1987), *review denied* (Minn. Jan. 20, 1988). After the above comments about the social environment in which Hughart committed the offenses, the district court continued:

> ***3** Now, there is a divergence of opinion about the defendant's ability to be successful at treatment, to be amenable to probation. And I've gone back and reread and tried to assess as best I can the psychological or psychosexual evaluations that have been done, and again fall back on just a gut instinct of my own observations of the defendant in my courtroom, but also what has been reported to me as his conduct while on release or/and including while he's been incarcerated.
>
> Giving consideration to all that, then I go back to what I stated earlier about my goal to treat the defendant in light of my view of him as others of those who have been convicted of criminal sexual conduct in the first degree. And in, again, the large majority of those cases, those individuals who have come before me have been given the opportunity to prove that they are amenable to treatment and the[ ] execution [of their sentence] has been stayed.
>
> So with that being said, for these reasons I do find that there are substantial and compelling circumstances for departing from the presumed sentence of one hundred forty four months.

Hughart argues that this passage indicates that the district court clearly intended to depart on the basis of the Hughart's amenability to probation.

A defendant's amenability to probation can supply a sufficient basis for departure. *State v. Trog,* 323 N.W.2d 28, 31 (Minn.1982); *State v. Donnay,* 600 N.W.2d 471, 474 (Minn.App.1999), *review denied* (Minn. Nov. 17, 1999). In *Trog,* the Minnesota Supreme Court highlighted several factors relevant to a determination of amenability to probation, including the defendant's age, prior record, remorse, and attitude in court. 323 N.W.2d at 31.The factors listed in *Trog* are not exclusive, and the district court need not recite findings as to each *Trog* factor on the record. *State v. Hickman,* 666 N.W.2d 729, 732 (Minn.App.2003). But here, the district court articulated no clear evidentiary basis for a finding that Hughart is amenable to probation, and indeed, never made an explicit finding to that effect.

As the district court noted, the record contained evaluations with contradictory assessments of Hughart's amenability to probation. The district court did not adopt either evaluation but simply stated that Hughart should be given the opportunity to prove his amenability. The record here stands in contrast to that of *State v. Brown,* in which the district court expressly adopted a party's departure memorandum as the basis for its decision to depart. 455 N .W.2d 65, 71 (Minn.App.1990), *review denied* (Minn. July 6, 1990). As such, the record before us is insufficient for meaningful appellate review. Because the district court may consider a host of factors as part of its analysis of a defendant's amenability to probation, we require clear, explicit findings of fact to facilitate appellate review. *See, e.g., State v. Heywood,* 338 N.W.2d 243, 243 (Minn.1983) (considering defendant's passive role and that offense was first felony in examining amenability to probation); *Trog,* 323 N.W.2d at 30 (considering, among other factors, family and community support in determining amenability to probation); *State v. Wright,* 310 N.W.2d 461, 462 (Minn.1981) (discussing defendant's high risk for abuse in prison in evaluating amenability to probation).

***4** The Minnesota Sentencing Guidelines require specific findings that "demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence."Minn. Sent. Guidelines II.D. In *State v. Garrett,* we reversed a district court's upward departure for insufficient findings. 479 N.W.2d 745, 749 (Minn.App.1992), *review denied* (Minn. Mar. 19, 1992). There, the state argued that the reasons for the departure "were made sufficiently clear in the prosecutor's departure memorandum and in the ensuing argument before the court."*Id.* Hughart advances the same argument here, reasoning that the district court implicitly agreed with his submissions and arguments at the sentencing hearing. As in *Garrett,* this argument is unavailing. The sentencing guidelines and our precedent require the district court to "make its own findings." *Id.* Accordingly, we reverse the dispositional departure imposed by the district court.

We next consider the question of remedy. The state argues that the absence of clear findings in this case compels us to impose the presumptive sentence, an executed term of 144 months' imprisonment. The state cites *Williams,* in which the Minnesota Supreme Court articulated the following general rules:

> 1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.
>
> 2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
>
> 3. If the reasons given justify the departure, the departure will be allowed.
>
> 4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.
>
> 5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

361 N.W.2d at 844.The supreme court recently reaffirmed the first *Williams* rule, making clear that, when a district court offers no reason for a departure at the time of sentencing, the departure will be reversed and the presumptive sentence imposed. *Geller,* 665 N.W.2d at 517.It is important to note, however, that the rules in *Williams,* as reaffirmed by *Geller,* developed from upward-departure cases. *See, e.g., Id.;State v. McAdory,* 543 N.W.2d 692, 698 (Minn.App.1996); *State v. Hopkins,* 486 N.W.2d 809, 812 (Minn.App.1992); *State v. Sundstrom,* 474 N.W.2d 213, 216 (Minn.App.1991); *State v. Pieri,* 461 N.W.2d 398, 401 (Minn.App.1990); *State v. Synnes,* 454 N.W.2d 646, 647 (Minn.App.1990), *review denied* (Minn. June 26, 1990); *State v. Thompson,* 414 N.W.2d 580, 584 (Minn.App.1987), *review denied* (Minn.

Jan. 15, 1988); *State v. Gunderson,* 407 N.W.2d 143, 145 (Minn.App.1987); *Williams,* 361 N.W.2d at 844.

We do not agree with the state's argument that we must impose the presumptive sentence. First, this is not an upward-departure case. Second, this is not a case in which the district court simply imposed a departure without reason. The sentencing transcript before us falls somewhere between the fourth and fifth *Williams* rules. 361 N.W.2d at 844.The district court offered two reasons for departure, one improper and one proper. We cannot effectively evaluate whether the evidence in the record is sufficient to justify the departure as required by *Williams* because, although the district court mentioned amenability to probation, the district court never articulated an evidentiary basis for that finding. It is unclear to us whether the district court relied on its observations of the defendant in court, the defendant's behavior on probation and release, the report of a defense expert, the district court's sentencing practice in prior cases involving the same offense, or a combination of these and other unknown factors. As such, we require additional findings of fact from the district court.

***5** Since *Geller* was decided, district courts have not been permitted to articulate new findings justifying sentencing departures on remand. *See, e.g., State v. Richardson,* 670 N.W.2d 267, 285 (Minn.2003). The Minnesota Supreme Court's reluctance to allow this practice is eminently logical in the context of an upward departure. A defendant receiving a sentence that is longer or more severe than that presumed under the law deserves an explanation at the time the sentence is imposed so as to ensure compliance with the sentencing guidelines in a manner that protects the defendant's rights. *See generally State v. Haas,* 280 Minn. 197, 200–01, 159 N.W.2d 118, 121 (Minn.1968) (holding that any reasonable doubts concerning interpretation of penal statutes be resolved in favor of defendant). Accordingly, when a district court fails to give reasons for an upward departure at the time of the sentencing hearing, we impose the presumptive sentence. *See, e.g., State v. Rannow,* 703 N.W.2d 575, 580 (Minn.App.2005).

In the context of a downward dispositional departure, however, equitable principles produce the opposite result. Our duty as an appellate court demands that we reverse for insufficient findings when we cannot fulfill our reviewing role, but consideration of the district court's opportunity to observe the defendant and the entire trial demands that we allow the district court to articulate its rationale for a downward dispositional departure on remand. *See generally State v. Dokken,* 487 N.W.2d 914, 918 (Minn.App.1992) ("[T]o ... reverse a dispositional downward departure and institute a ... presumptive sentence is a weighty and grave matter for an intermediate appellate court. We have the authority ... but the action is drastic."), *review denied* (Minn. Sept. 30, 1992). This conclusion is consistent with the statute granting us authority to review criminal sentences on appeal. We may "dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings...."Minn.Stat. § 244.11, subd. 2(b) (2004). Moreover, in the context of a downward dispositional departure, we are aware of no precedent proscribing a remand to address the insufficiency of findings.

Because the district court's findings are insufficient to facilitate effective appellate review, we reverse Hughart's sentence and remand for resentencing consistent with this opinion.

Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2006 WL 923526

Footnotes

1 Minn.Stat. § 609.342, subd.1(a) (2002) provides:

> A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age ... is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:
> (a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense[.]

2 Minn.Stat. § 609.343, subd. 1(a) (2002) provides:

> A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced[.]

3 Minn.Stat. § 260B.425, subd. 1(a) (2002) provides: "Any person who by act, word, or omission encourages, causes, or contributes to delinquency of a child or to a child's status as a juvenile petty offender, is guilty of a gross misdemeanor."

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