IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. COREY ROBERT FENTON, Defendant-Appellant.	SUPREME COURT NO. 22-1681

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE
(TRIAL, POSTTRIAL, AND SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JANUARY 10, 2024

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the district court's admission of a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice?

II. Whether the Court of Appeals erred in concluding sufficient evidence established anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance, or that Fenton enticed, coerced, recruited, or attempted to entice, coerce, or recruit an individual to engage in commercial sexual activity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes and Court Rules:

STATEMENT IN SUPPORT OF FURTHER REVIEW

Corey Fenton requests, pursuant to Iowa Rule of Appellate Procedure 6.1103, that this Court grant further review of the January 10, 2024 decision of the Iowa Court of Appeals affirming his convictions.

The Court of Appeals erred in concluding a photographic exhibit depicting an erect penis was properly admitted. The court concluded the exhibit's probative value was not substantially outweighed by the danger of unfair prejudice. Opinion pp. 4–5. But both sources of the exhibit's probative value relied upon by the court—contradicting Fenton's assertion he did not send the photo, and the fact it was sent using a disappearing-message feature—are not established by the photo at all. The photo exists, which Fenton did not deny and was established by other evidence, but contains nothing proving it was actually sent by Fenton or depicted him, or indicating it was sent using the disappearing-message feature. The points relied upon by the Court of Appeals do not apply to

the exhibit, and any other minimal potential probative value was heavily outweighed by the danger of unfair prejudice.

The Court of Appeals also erred in concluding sufficient evidence supports Fenton's conviction for solicitation of commercial sexual activity. There are no other cases interpreting Iowa Code section 710A.2A, and the Court of Appeals made a crucial error which reads an element out of the offense. As a result, this is a matter of great public importance which should be decided by this Court. See Iowa R. App. P. 6.1103(1)(b)(4). The Court of Appeals concluded various statements, including a discussion of renting a truck-stop shower as a place to engage in sex acts, demonstrated a "thing of value" offered in exchange for a sex act. Opinion pp. 6–8. None of those statements involved the quid pro quo dimension which is central to the offense at issue. The Court of Appeals' reading vastly expands the scope of the statute beyond the plain language of the statute. This Court should grant further review to correct that error.

STATEMENT OF THE CASE

Nature of the Case

The defendant-appellant, Corey Fenton, requests further review of the Court of Appeals' decision affirming his conviction, judgement, and sentence for solicitation of commercial sexual activity, a class D felony, in violation of Iowa Code section 710A.2A.

Course of Proceedings and Facts

Fenton generally accepts as accurate the Court of Appeals' recitation of the procedural history and facts. A detailed recitation is contained in the appellant's brief.

ARGUMENT

I. The Court of Appeals erred in affirming the district court's admission of a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice.

The Court of Appeals concluded a photographic exhibit depicting an erect penis was properly admitted because its

probative value was not substantially outweighed by the danger of unfair prejudice. That conclusion was incorrect.

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa R. Evid. 5.403. "To apply this rule, courts ask two questions: (1) what is the probative value of the evidence? And (2) does the danger of its wrongful effect on the jury weigh heavily against that probative value?" State v. Sassman, No. 21-0434, 2022 WL 4361785, at *4 (Iowa Ct. App. Sept. 21, 2022) (citing State v. Buelow, 951 N.W.2d 879, 889 (Iowa 2020)).

The Court of Appeals stated the photo had probative value which was not cumulative to other evidence because "[a]lthough detectives asked Fenton about sending the photo, Fenton never admitted that he sent it." Opinion p. 4. While it is true that Fenton denied sending the photo and denied

that it depicted his penis when officers showed it to him, the discussion (and later testimony) nonetheless established the photo was sent. See (Exhibit 10 Interview at 19:14–20:01); (5/9/2022 Trial Tr. p. 179 L. 10–19). On the other hand, the exhibit does not contain any identifying information (such as a phone number or screen name) linking the photograph to Fenton. The exhibit established the photograph existed—which was not disputed at trial—but not that Fenton sent it or that it depicted his penis. It carried no probative value on the first point relied upon by the Court of Appeals.

The Court of Appeals also believed "the photo has probative value beyond Fenton's intent to engage in sexual activity" because it was sent "using the feature that caused the message to disappear after [the officer] viewed it, indicating knowledge of his guilt." Opinion pp. 4–5. But the exhibit does not contain any indication the photo was sent using the disappearing-message feature, and thus was not probative on this point either. The fact the message disappeared after a

period of time was testified to by Lowe, who described how the feature worked and that the penis photo was sent using that feature. (5/9/2022 Trial Tr. p. 176 L. 23–p. 179 L. 19). The photo was not probative on the second point relied upon by the Court of Appeals, and even if it were that probative value was cumulative to testimony.

Both points relied upon by the Court of Appeals were established by evidence aside from the photo, and neither were actually established by the exhibit. The photos were irrelevant to both points cited by the Court of Appeals, and overall carried very little, if any, other probative value because of its cumulative nature. See State v. Redmond, 803 N.W.2d 112, 123 (Iowa 2011) ("Cumulative evidence, for example, may carry less probative value.").

That low probative value was substantially outweighed by the danger of unfair prejudice. "Evidence that . . . provokes [the jury's] instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on

something other than the established propositions in the case is unfairly prejudicial." State v. Henderson, 696 N.W.2d 5, 10–11 (Iowa 2005) (citations and internal quotation omitted, second alteration in original). The photo carried significant danger of triggering the jury's instinct to punish, or of otherwise improperly influencing the jury's view of the case. It is one thing for the jury to know of the photo's existence; it is quite another to make them view it. In light of the minute probative value, and video-recorded discussion of the photo's existence in addition to testimony on the subject, the photo's probative value was substantially outweighed by both the danger of needlessly presenting cumulative evidence and the danger of unfair prejudice.

Finally, the State failed to establish the photo's admission was harmless. The Court of Appeals relied on the fact "the jury viewed the sexually explicit messages Fenton exchanged with [the officer]" to conclude the photo was unlikely to have an improper result on the jury. Opinion p. 5.

But as discussed below, the conversation contained no evidence meeting the "commercial sexual activity" element of this offense. Fenton's conviction despite this lack of evidence indicates the jury was improperly swayed by something; the exhibit cannot be ruled out as the source of that improper influence. The Court of Appeals erred in affirming the district court on this issue.

Conclusion

The Court of Appeals erred in affirming the district court's denial of Fenton's objection to exhibit 6, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and the danger of unfair prejudice. Fenton's conviction should be vacated and the case remanded for new trial.

II. The Court of Appeals erred in concluding sufficient evidence established anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance, or that Fenton enticed, coerced, recruited, or attempted to entice, coerce, or recruit an individual to engage in commercial sexual activity.

The Court of Appeals concluded discussions about renting a truck-stop shower for a place to have sex, a statement about "spoiling a likl [sic]", and a statement about having money after Officer Lowe suggested Fenton make some, constituted substantial evidence Fenton offered something of value in exchange for sex. Opinion pp. 6–7. That is incorrect. Additionally, the Court of Appeals erred in concluding the conversation involved enticement, coercion, or recruitment by Fenton rather than by Lowe, because all portions either the State or the Court of Appeals believed involved commercial sexual activity were entirely driven by the officer.

Iowa Code section 710A.2A is titled "Solicitation of commercial sexual activity" and reads:

> A person shall not entice, coerce, or recruit, or attempt to entice, coerce, or recruit, either a person who is under the age of eighteen or a law enforcement officer or agent who is representing that the officer or agent is under the age of eighteen, to engage in a commercial sexual activity. A person who violates this section commits a class "D" felony.

Iowa Code § 710A.2A. Commercial sexual activity is defined as follows:

> "Commercial sexual activity" means any sex act or sexually explicit performance for which anything of value is given, promised to, or received by any person and includes, but is not limited to, prostitution, participation in the production of pornography, and performance in strip clubs.

Iowa Code § 710A.1. The jury was instructed in accord with these sections. (Jury Inst. No. 14 Solicitation of Commercial Sexual Activity Marshalling; Jury Inst. No. 15 Commercial Sexual Activity Definition) (App. pp. 13-14).

The plain language "for which anything of value is given, promised to, or received" means commercial sexual activity requires an exchange (or a promise of an exchange) of a thing of value for a sex act or sexually explicit performance. At trial, the State persistently read this requirement out of the

law, claiming the offense does not require proof of "quid pro quo, tit for tat, 'I'm giving you this in exchange for that.'" (5/10/2022 Trial Tr. p. 42 L. 5–7). The Court of Appeals made the same error.

Giving proper consideration to the exchange requirement demonstrates the State failed to establish the element was met in this case. The discussion of renting a shower room to have sex there was about arranging a place for sex, not payment "for which" sex would be provided. A hypothetical demonstrates the flaw in the Court of Appeals' reasoning on this point: under its reading, a person who tells their spouse they will rent a hotel room for the purpose of having sex there has engaged in commercial sexual activity. So has a couple who rents an Uber to go to a location and have sex (another circumstance the State argued was sufficient but which is not discussed by the Court of Appeals). See Appellee's Brief p. 29, 32. This is a patently absurd result; canons of statutory interpretation counsel against interpreting law in a manner

that produces absurd results. See Iowa Code § 4.4(3) ("In enacting a statute, it is presumed that . . . [a] just and reasonable result is intended."); Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724, 728 (Iowa 1995) (citations omitted)). The Court of Appeals' conclusion transforms the statutory language "for which anything of value is given, promised to, or received" into "for the purpose of" and ignores the crucial difference. See Opinion p. 6 ("Promising to pay for the shower room for the purpose of sex act [sic] is commercial sexual activity.").

The other portions of the conversation relied upon by the Court of Appeals similarly do not constitute offers in exchange for sex. Lowe asking Fenton what he would do for a threesome, then suggesting "Idk. Girls like food and clothes lol", and Fenton's response he has "no prob spoiling a likl [sic]" was a flirtatious exchange, initiated and pursued by Lowe, with no indication a sex act was actually conditioned on Fenton providing food and clothing. See (Exhibit 7 Facebook

Conversation p. 63) (Ex. App. p. 68). The same can be said of the exchange where Lowe told Fenton to "go make some money" because "it always feels good to have a lil $." and Fenton responded "I have money and you have?"; there is no indication any sex act was premised on Fenton providing money. See (Exhibit 7 Facebook Conversation p. 71) (Ex. App. p. 76). Fenton acknowledges such a premise might not always be stated in express terms, but there still must be enough to support a reasonable inference as opposed to speculation, suspicion, or conjecture. See State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). None of the portions of the conversation relied upon by the State or by the Court of Appeals rise to that level. The fact Lowe explicitly entertained meeting Fenton for sex before Lowe began injecting anything the State or Court of Appeals considers transactional reinforces the conclusion it was not. See (Exhibit 7 Facebook Conversation pp. 116–117) (Ex. App. pp. 121-122). The Court

of Appeals erred by reading the transactional component out of the statute.

Additionally, the evidence shows that even if there were any quid pro quo aspect to any part of the conversation, Lowe was attempting to entice, coerce, or recruit Fenton to engage in the transaction, rather than the other way around. The Court of Appeals' discussion of the entice/coerce/recruit aspect of Fenton's challenge focuses on the fact Fenton "wanted to engage Neveah in a variety of sex acts." Opinion p. 7. That focus misses the point of Fenton's argument. The State was required to prove Fenton enticed, coerced, or recruited (or attempted to do so) a person posing as a minor to engage in commercial sexual activity, not just sex acts. (Jury Inst. No. 14 Solicitation of Commercial Sexual Activity Marshalling; Jury Inst. No. 15 Commercial Sexual Activity Definition) (App. pp. 13-14). Fenton has never disputed he pursued sex with the fictional Neveah; he argued the State

failed to prove the commercial, quid pro quo aspect of the offense.

It is that commercial aspect which—if the Court believes it existed at all—was completely driven by Lowe (posing as Neveah). Lowe asked, unprompted, if Fenton was going to bring him food. (Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52). Lowe asked what Fenton would do for a threesome, and suggested "Girls like food and clothes lol". (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68). Lowe asked Fenton what he might want to do "after our time in the shower" and when Fenton said he liked to smoke marijuana Lowe said "Lol ok I'm down". (Exhibit 7 Facebook Conversation p. 27) (Ex. App. p. 32). On the day they had planned to meet, Lowe indicated he would pay for both the shower and an Uber ride for Fenton. (Exhibit 7 Facebook Conversation p. 9) (Ex. App. p. 14). All of the details relied upon by the State at trial or the Court of Appeals in its opinion

were suggested and encouraged by Lowe, not Fenton. The Court of Appeals erred in failing to recognize this fact.

Conclusion

The Court of Appeals erred in concluding sufficient evidence established Fenton offered anything of value in exchange for a sex act, or engaged in enticement, coercion, or recruitment. His conviction should be vacated and the case remanded for dismissal.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $1.29, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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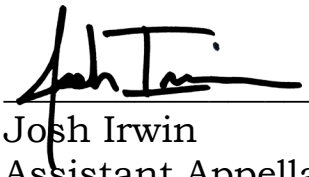

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