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IN THE COURT OF APPEALS OF INDIANA

Michael Bedtelyon,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 4, 2022

Court of Appeals Case No. 21A-CR-1952

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1802-F4-16

Weissmann, Judge.

[1] Forbidden by the terms of his probation from accessing obscene material, Michael Bedtelyon landed in hot water with his probation officer after watching sexually suggestive anime cartoons. The court concluded the material constituted obscenity and revoked four years of Bedtelyon's suspended sentence. On appeal, Bedtelyon argues that the State failed to prove the videos constituted obscenity as defined by statute. We agree.

Facts

[2] Bedtelyon was convicted of Level 4 felony sexual misconduct with a minor for criminal acts he committed with a 14-year-old girl he met on a dating app. After serving part of his eight-year sentence, Bedtelyon was released on probation. As a term of his probation, Bedtelyon was "prohibited from accessing, viewing, or using internet websites and computer applications that depict obscene matter as defined by IC 35-49-2-1." App. Vol. II, p. 193. [1]

[3] Through software required by the terms of his probation, Bedtelyon's probation officer learned that Bedtelyon had viewed several anime[2] videos on YouTube with concerning titles, including: *My Mother and Sister Pretend to Be Expecting My Babies After I Lost My Memory*; *I Seduced My Cousin and Let Him Do Everything He Wanted*; and *I am the Seventh of Sextuplet Girls and I Am a Boy*. After viewing these

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[1] Though this condition was set forth in the parties' briefs, it does not appear among the conditions of probation entered by the trial court at sentencing or elsewhere in the record. *Compare id.* at 59 *with id.* at 193. Because Bedtelyon does not challenge this discrepancy, we will not address it.

[2] Anime is a style of animation that originated in Japan. Tr. Vol. II, p. 7; *see also Anime*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/anime (last visited Feb. 16, 2022).

videos, Bedtelyon's probation officer determined they were obscene and therefore violated the terms of Bedtelyon's probation. The court agreed and revoked his probation. *Id.* at 201. Bedtelyon now appeals.

Discussion and Decision

[4] Bedtelyon argues the court erroneously revoked his probation because the YouTube videos he watched were not obscene as defined by statute. A trial court may revoke a person's probation if the State proves by a preponderance of evidence that the person has violated a condition of probation during the probationary period. *Phipps v. State*, 177 N.E.3d 123, 125 (Ind. Ct. App. 2021) (citing Ind. Code § 35-38-2-3(a), (f)). We review a probation revocation for abuse of discretion. *Id.* "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances." *Id.* (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)). In making this determination, we consider only the evidence most favorable to the judgment and do not reweigh evidence or judge the credibility of witnesses. *Id.* (quoting *Woods v. State*, 892 N.E.2d 637, 639 (Ind. 2008)).

[5] Though Bedtelyon does not make arguments related to freedom of speech, the First Amendment of the United States Constitution and Article I, Section 9 of the Indiana Constitution inevitably loom large in discussions of obscenity. Obscenity belongs to a limited class of speech that is not guaranteed state or federal protection. *Fordyce v. State*, 569 N.E.2d 357, 362 (Ind. Ct. App. 1991) ("[O]bscenity was not intended to be cloaked with the protection of the free

speech clause [of Indiana's Constitution]"); *Roth v. United States*, 354 U.S. 476 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press."). In regulating obscenity, however, states must be careful not to brush so broadly as to chill those classes of speech that are protected. *Miller v. California*, 413 U.S. 15, 23-24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited.")

[6] We have found that Indiana's obscenity statute is not broad enough to offend the First Amendment or Indiana's Constitution. *Fordyce,* 569 N.E.2d at 359-60. But the United States Supreme Court has articulated a narrow path for constitutional obscenity restrictions. *Miller*, 413 U.S. at 24 ("[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed."). We hesitate to adopt any interpretation that would broaden the meaning of the statute and risk upsetting its constitutionality. *See, e.g.*, *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 396 (Ind. 2018) ("[S]tatutes should be interpreted so as to avoid constitutional issues.").

I. Definitions

[7] Statutory definitions shape our analysis. Per statute, something is obscene if:

> (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or

> performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and
>
> (3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Ind. Code § 35-49-2-1 (Obscenity Statute). Sexual conduct is defined by statute to mean:

> (1) Sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5);
>
> (2) exhibition of the uncovered genitals in the context of masturbation or other sexual activity;
>
> (3) exhibition of the uncovered genitals of a person under sixteen (16) years of age;
>
> (4) sado-masochistic abuse; or
>
> (5) sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with an animal.

Ind. Code § 35-49-1-9 (Sexual Conduct Statute). "'Other sexual conduct' means an act involving: (1) a sex organ of one . . . person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5.

[8] Finally, this Court has acknowledged that the word "depict" can mean "to form a likeness of by drawing or painting … to represent, portray, or delineate in other ways than in drawing or painting." *Fordyce*, 569 N.E.2d at 364 (quoting

Fordyce's Br. at 8 (quoting *Webster's Third New International Dictionary* (Merriam-Webster 1986))). A more recent Merriam-Webster entry defines "depict" as "to represent by or as if by a picture." *Depict*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/depict (last visited Feb. 16, 2022). It defines "describe" as "to tell someone the appearance, sound, smell, events, etc., of (something or someone): to say what something or someone is like" and "to represent or give an account of in words." *Describe*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/describe (last visited Feb. 16, 2022).

II. No Evidence of the Depiction or Description of Sexual Conduct

[9] Bedtelyon argues that the State failed to prove that the videos he watched depicted or described sexual conduct as defined by statute. Bedtelyon is correct. The videos were not admitted into evidence, and we cannot determine that the court actually viewed them. Instead, the court relied on the testimony of Bedtelyon's therapist and probation officer who watched the videos and obliquely described the content. Their testimony reveals that the cartoons feature "provocatively dressed," though never naked, women. Tr. Vol. II, pp. 14, 25. The animated characters all experience incestuous attraction. *Id.* at 8, 25-28. Overall, the evidence suggests that these videos might have erotic themes, are erotic in tone, and describe erotic feelings. But the State did not present evidence that sexual conduct *as defined by statute* was depicted or described, rather than merely implied.

[10] In the first video, *My Mother and Sister Pretend to Be Expecting My Babies After I Lost My Memory*, the titular mother and sister pretend to care for their shared brother and son. Bedtelyon's probation officer testified, "At some point he impregnated them both and they were carrying his children." [3] *Id.* at 25-26. The sister "was clearly in love with him." *Id.* at 26. These details suggest that the video heavily implies incestuous sex but not that such sex was depicted or described. This is so even though two of the characters become pregnant. Without evidence that the video showed or recounted the act leading to conception, we cannot say the video depicted or described sexual conduct.

[11] The second video, *I Seduced My Cousin and Let Him Do Everything He Wanted*, features an "attractive" sixteen-year-old girl telling a story about her crush on her sixteen-year-old male cousin. "After great efforts of trying to seduce [him], he ended up spending the night with her cuddling, kissing all over." *Id.* at 26. The two begin dating and wrangle with how to disclose their relationship to their family. Again, none of the actions depicted or described satisfy the statutory definition of "sexual conduct." *See* Ind. Code § 35-49-1-9. "Kissing all over" could describe "other sexual conduct"—namely mouth to genital contact—but it could also describe behavior squarely outside the bounds of the Sexual Conduct Statute. *See* Ind. Code § 35-31.5-2-221.5. Where multiple witnesses testified that the characters were never nude, and there was no

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[3] Bedtelyon testified that neither woman was actually pregnant, which the video's title corroborates. Tr. Vol. II, p. 60. Considering only the evidence in favor of the judgment, however, we accept Bedtelyon's probation officer's description here. *See Phipps*, 177 N.E.3d at 125.

testimony that any character exhibited their genitals, it is too great a deductive leap to determine that this testimony describes the sexual conduct the Obscenity Statute was intended to reach. Tr. Vol. II, pp. 14, 25.

[12] The third video, *I am the Seventh of Sextuplet Girls and I Am a Boy*, stars sextuplets, the seventh of which identifies as a boy.[4] By the end of the video, two of his sisters fall in love with him.

> They are feeling his bulgy muscles. They are continuously all over their brother to the point where they make him feel uneasy about the situation. They end up sleeping in his room . . . And I think at the very end of the video, the brother wakes up and actually finds his two sisters in bed with him. And, you know . . . they are sitting there smiling.

Tr. Vol. II, p. 27. This video, too, fails to depict or describe anything more than implied sexual intercourse. That the sisters were "all over" their brother and "in bed with him" alone is not "sexual conduct" as defined by statute. Ind. Code § 35-49-1-9. The content is certainly suggestive, but suggestion of sexual conduct alone cannot constitute obscenity. *See Miller*, 413 U.S. at 24 ("[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct."); *see also T.V. ex rel. B.V. v. Smith-Green Comty. Sch. Corp.*, 807 F.Supp.2d 767, 778 (N.D. Ind. 2011) (holding that sexually suggestive photographs were not unprotected obscenity because they did not

[4] Careful readers will notice that sextuplets are only six, not seven, siblings. The record contains no explanation for this discrepancy.

depict sexual conduct as defined by Indiana law) (citing *Miller*, 413 U.S. at 24). If sexual suggestion alone triggered the Obscenity Statute, censors could train their scopes on clearly constitutional expression, from great literature to soap operas to internet memes.

[13] Bedtelyon's probation officer conceded that the type of sexual conduct forbidden by statute was left to the viewer's imagination, describing the videos as largely "thought provoking" and "intended to . . . provoke . . . deviate thinking." Tr. Vol. II, pp. 26, 28. Bedtelyon's therapist testified that the videos were concerning because their content "feeds that deviate fantasy." *Id.* at 15. But matters that encourage deviate thinking are not necessarily obscene—which Bedtelyon's probation officer also acknowledged when he testified, "I guess where I said obscene maybe doesn't necessarily make it illegal." Tr. Vol. II, p. 37. Here, the probation officer is right. The United States Supreme Court has limited regulation of obscene materials to those that "depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Miller*, 413 U.S. at 27.

III. The State's Arguments are Conclusory

[14] In defense of the revocation, the State invokes *Fordyce v. State*. 569 N.E.2d 357. In *Fordyce*, a bookseller was convicted of distributing obscene books that depicts or describes someone less than sixteen years old, a Class D felony at the time. *Id.* at 358. The Obscenity Statute has remained unchanged since before the facts of *Fordyce*. *See* Ind. Code § 35-49-2-1. These books detailed "various sexual

activities" between a mother and son, the "sexual experiences" a mother, her teenage daughter, and her daughter's friend have with two dogs, and a teenage boy who "shows up to engage in a sexual romp." *Fordyce*, 569 N.E.2d at 358. The State argues that because the books in *Fordyce* were obscene, the videos Bedtelyon viewed are, too. After all, both feature incest and neither include pictures of nudity.

[15] This argument glosses over what actually made the materials in *Fordyce* obscene. Per the Obscenity Statute, it was not only that the books featured incestuous attraction, but also that incestuous sexual conduct was depicted or described. *Id.* Though *Fordyce* does not detail what acts are described in these books, the language our Court used implies sexual conduct as defined by our Sexual Conduct Statute, and the Court's finding of obscenity required such acts.[5] Likewise, the issue of nudity is a red herring. The only relevant inquiry on appeal is whether these videos depict or describe sexual conduct in a patently offensive manner. The State fails to meaningfully engage in this inquiry, instead broadly citing the probation officer's testimony of the sexually suggestive topics in the videos and making the conclusory assertion that "the probation officer

[5] Unlike the Obscenity Statute, the Sexual Conduct Statute was amended after *Fordyce*. These amendments do not affect our analysis here, as they simply replaced references to "deviate sexual conduct" with "other sexual conduct (as defined in IC 35-31.5-2-221.5)." 2013 Ind. Legis. Serv. P.L. 158-2013 (H.E.A. 1006) (West). "Deviate sexual conduct" described exactly the same acts as "other sexual conduct." *Compare* Ind. Code § 35-41-1-9 (2012) and Ind. Code § 35-31.5-2-221.5.

described sexual conduct." Appellee's Br., p. 8. We cannot infer that sexual conduct occurred from such a slim record.

[16] The State failed to prove by a preponderance of the evidence that Bedtelyon violated his probation when it produced no evidence that he had accessed or viewed obscene videos—that is, videos depicting or describing sexual conduct in a patently offensive manner. *See* Ind. Code § 35-49-2-1(2). The trial court therefore abused its discretion in finding a violation and revoking four years of Bedtelyon's suspended sentence.

[17] Reversed and remanded.

Najam, J., and Vaidik, J., concur.