MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
JEREMY BAUM, Appellant.

DOCKET NUMBER WD85148

DATE: May 14, 2024

Appeal From:

The Circuit Court of Johnson County, Missouri
The Honorable R. Michael Wagner, Judge

Appellate Judges:

Division Three:

Karen King Mitchell and Edward R. Ardini, Jr., Judges, CONCURRING IN MAJORITY.

Alok Ahuja, Presiding Judge, DISSENTING IN SEPARATE OPINION.

Attorneys:

Andrew Bailey, Attorney General, and Richard A. Starnes, Assistant Attorney General, Jefferson City, MO, Attorneys for Respondent.

James Egan, Assistant State Public Defender, Columbia, MO, Attorney for Appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
JEREMY BAUM, Appellant.

WD85148 Johnson County

Before Division Three Judges: Alok Ahuja, Presiding Judge, and Karen King Mitchell and Edward R. Ardini, Jr., Judges

Jeremy Baum appeals, following a jury trial, his convictions of sexual trafficking of a child in the second degree, § 566.211, RSMo, and promoting a sexual performance by a child, § 573.205, RSMo, for which he was sentenced (with other convictions not at issue in this appeal) to a total of twenty-seven years' imprisonment. Baum raises five claims on appeal, all directed at the sufficiency of the evidence presented at trial. Points I and V challenge the sufficiency of the evidence to support both a conviction (Point I) and a verdict director (Point V) for sexual trafficking. Baum suggests that, because the evidence established that he was a participant in the acts alleged to be a sexual performance, he could not also be the audience and, without an audience, the conduct could not amount to a performance as required for the crime of sexual trafficking. In Points II, III, and IV, he challenges the sufficiency of the evidence to support both a conviction (Points II and III) and a verdict director (Point IV) for promoting a sexual performance. Baum argues that (1) the conduct underlying the charge was insufficient to prove a sexual performance and (2) what evidence there was showed the conduct occurred in Florida, rather than Missouri, and did not support a finding that he directed Victim to engage in a sexual performance. As laid out below, we do not believe any of Baum's points on appeal merit relief and would ordinarily affirm. But, given the nature of the disagreement between the majority and dissent, we believe this case raises issues of general interest and importance. Therefore, rather than enter a final decision affirming Baum's convictions, we transfer this matter to the Missouri Supreme Court pursuant to Rule 83.02.

TRANSFERRED TO THE SUPREME COURT PURSUANT TO RULE 83.02.

Majority Opinion holds:

1. For the purpose of both §§ 566.211.1(1) and 573.201.1, RSMo, a "sexual performance" need not be public, and need not be visually observed by the intended

audience. Instead, a performance consists of the child's anticipated behavior involving sexual conduct in response to some manner of instigation by the defendant.

2. A reviewing court determines whether the evidence was sufficient to support a conviction by examining the way the defendant is charged and not the way the jury was instructed.

3. The evidence and reasonable inferences therefrom, viewed in the light most favorable to the charge, establish that Baum watched Victim masturbate in front of him at his direction, making him an audience of one, and this evidence is sufficient to establish a "sexual performance" for purposes of second-degree trafficking of a child. It is irrelevant whether Baum was also a recipient of sexual contact from Victim during the same encounter.

4. Baum failed to identify any error in the language of the verdict director for his second-degree trafficking conviction, instead choosing to challenge only the giving of the instruction as not supported by sufficient evidence. Because the evidence was sufficient, and Baum raised no other claims of error related to the verdict director, there is no plain error for this court to review.

5. The evidence and reasonable inferences therefrom, viewed in the light most favorable to the charge, establish that Baum instructed Victim to use a pink vibrator for masturbation in private and report back to him after having done so, and this evidence is sufficient to establish that Baum directed a performance for purposes of promoting a sexual performance by a child. It is irrelevant that Victim's performance in response to Baum's direction did not occur in his presence or simultaneously with his directions.

6. The evidence and reasonable inferences therefrom, viewed in the light most favorable to the charge, establish that each of the elements of the promoting a sexual performance by a child offense occurred in Missouri. Accordingly, both the verdict director and the conviction of this offense were supported by sufficient evidence. It is irrelevant that Baum's offending behavior began in Florida, given the evidence that it both continued and escalated after the family moved to Missouri.

Dissenting Opinion holds:

Judge Ahuja dissents. In his view, this Court's sufficiency-of-the-evidence review must focus on the manner in which the offenses were submitted to the jury; this Court cannot affirm Baum's convictions based on acts different from those on which the jury relied to convict him. Judge Ahuja also contends that the current statutory definitions of a "sexual performance" require a visual display of sexual conduct in front of spectators. Viewed from that perspective, Baum's convictions for sexual trafficking, and for promoting a sexual performance, must be reversed. His incidental observation of the victim while they were engaged in a sexual act together cannot constitute an "exhibition"

"before an audience." Nor is it a "sexual performance" where the victim masturbated privately, but discussed that masturbation with Baum afterwards.

Majority Opinion by: Karen King Mitchell, Judge May 14, 2024
Edward R. Ardini, Judge, concurs
Dissenting Opinion by: Alok Ahuja, Presiding Judge

This summary is UNOFFICIAL and should not be quoted or cited.