No. 32354-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Eric G.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. RCW 9.68A.050 is unconstitutionally overbroad.

Eric G. was convicted of a felony sex offense under RCW 9.68A.050(1)(a)(i) for taking a photograph of his own penis, attaching it to a text message, and sending it to an adult. CP 67. He was 17 years old at the time. CP 66. If he had sent the photograph three months later, after his eighteenth birthday, these actions would not have constituted a crime. CP 66-67; RCW 9.68A.011(5) (defining a "minor" as "any person under eighteen years of age").

a. <u>The burden is on the State to show RCW 9.68A.050's content-based restrictions on speech are narrowly tailored to promote a compelling State interest.</u>

The statute under which Eric was prosecuted prohibits a substantial amount of constitutionally protected conduct and is therefore unconstitutionally overbroad. *See* Op. Br. at 5-18; U.S. Const. amends. I, XIV; Const. art. I, § 5. The State argues Eric's photograph was not entitled to constitutional protection because pornographic images of children have been found to constitute unprotected speech and Eric has failed to show that any exception exists for self-photography by children. Resp. Br. at 15. This claim ignores the fact that content-based restrictions on speech, like the

prohibition in RCW 9.68A.050, are *presumptively* unconstitutional and therefore subject to strict scrutiny. *State v. Williams*, 144 Wn.2d 197, 208, 26 P.3d 890 (2001).

Thus, the burden is not on Eric to demonstrate that his actions were entitled to constitutional protection. Instead, the burden is on the State to establish the statute is "narrowly tailored to promote a *compelling* [State] interest." *Id*. (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (emphasis orginial)). The State's general assertion that pornographic images of children have been found to constitute unprotected speech fails to address the question at issue: whether the State has a compelling interest in prosecuting children for sharing photos of their *own* naked bodies, and whether RCW 9.68A.050 is narrowly tailored to promote any such interest. *Id*.; Resp. Br. at 15.

b. <u>The State has not met that burden.</u>

The State claims a "compelling" interest in criminalizing Eric's act of sending a photograph of his own genitals to an adult because of "[t]he physical and psychological harm caused to children in the production (or re-production) of the material." Resp. Br. at 13. However, it is unclear what physical harm the State is referring to when

a child photographs himself, and any purported psychological harm is not equivalent to the harm relied upon in *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S.Ct. 3348, 72 L.Ed.2d 1113 (1982) or *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *see also* Op. Br. at 9-12. Here, the State argues the harm to the child is the inability of the child to exercise total control over his or her own image. Resp. Br. at 8-9. This *potential* harm stands in stark contrast to the harm with which the United States Supreme Court was concerned: the exploitation and sexual abuse of children in the course of the production of child pornography. *Ferber*, 458 U.S. at 756-57, *Free Speech Coalition*, 535 U.S. at 241.

The State claims the narrowly tailored solution to addressing this potential harm – that a child's photograph may be distributed in a way he or she did not intend – is to seek to convict that child of a felony sex offense, and require the child to register as a sex offender for ten years. RCW 9A.44.140. The State offers no justification for this draconian approach. Instead, relying on a Florida Court of Appeals

decision,[1] the State argues its interest is in preventing harm to "a minor defendant's own psyche, career, or personal life," while failing to acknowledge the extraordinary damage a felony sex offense conviction, and associated registration requirements, cause to the child's psyche, career, or personal life. Resp. Br. at 14 (citing *A.H.*, 949 So.2d at 237).

In addition, the State's suggestion that the legislature intended to address this type of harm is incorrect.[2] Resp. Br. at 7. Our legislature quoted directly from *Ferber* when it expressed its findings and the intent behind the statute. RCW 9.68A.001; *Ferber*, 458 U.S. at 757; Op. Br. at 14. When the legislature enacted RCW 9.68A.050, it specifically sought to punish those who engaged in the "sexual abuse of children." RCW 9.68A.001. There is no evidence it intended to prosecute the children who were the *subject* of the images, and the

[1] In *A.H. v. State*, the defendant raised a privacy challenge under the state constitution after she was criminally prosecuted for engaging in sexual behavior with her boyfriend, photographing these acts, and emailing the photos from one computer to another. 949 So.2d 234, 235 (2007). Unlike in this case, the defendant's alleged victim was her boyfriend, not the defendant herself. *Id.* One judge dissented, finding the majority "committed a serious error" when it allowed a statute designed to *protect* children to be used "*against* a child in a way that criminalizes conduct." *Id*. at 241 (Padovano, J., dissenting) (emphasis added).

[2] The State suggests that criminalizing "sexting" by a minor is justified despite no comparable prohibition for adults because the law often treats juveniles differently, citing to prohibitions against the use of alcohol. Resp. Br. at 15, n. 15. Its reliance on alcohol restrictions is inapposite, as the consumption of alcohol does not raise free speech concerns.

State has not articulated a compelling interest in doing so. For these reasons, and those presented in the Opening Brief, the statute is unconstitutionally overbroad in violation of article I, section 5, and the First Amendment, and reversal is required.

2. RCW 9.68A.050 is unconstitutionally vague.

a. The State concedes the statute does not protect against arbitrary enforcement.

A statute is void for vagueness if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" *or* the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (quoting *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993)). RCW 9.68A.050 fails both of these tests.

The State concedes the statute's standards do not protect against arbitrary enforcement when it asserts that although twenty percent of teenagers admit to producing and distributing nude or semi-nude pictures of themselves, the State chose to charge Eric because of his criminal history. Resp. Br. at 18. Where a statute is broad enough to cover a large portion of the population, but is enforced only against a certain subset of people, "it becomes 'a convenient tool for harsh and

discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' " and is unconstitutionally vague. *Desertrain v. City of Los Angeles,* 754 F.3d 1147, 1156 (9th Cir. 2014) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)).

The State acknowledges it is does not typically prosecute teenagers who send nude photographs of themselves to others over text message, but that it enforces the statute at its discretion when the teenager has a prior criminal history. Resp. Br. at 18. It attempts to explain this arbitrary enforcement of the statute by citing to one of the purposes of the Juvenile Justice Act, which is to "[p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile offender." RCW 13.40.010; Resp. Br. at 18, n. 20. However, the State fails to identify how the goal of appropriate *punishment* after the conviction of a crime justifies the arbitrary enforcement of RCW 9.68A.050. Indeed, the Juvenile Justice Act provides no such justification. The State's decision to prosecute Eric was an arbitrary application of the law.

b. An ordinary person would not understand the statute prohibited Eric's conduct.

The State also claims an ordinary person would understand a minor could be both the individual who committed the crime and the victim of that same crime. This bare assertion is contrary to the legislature's stated findings and intent, which suggest that when drafting the statute, the legislature did not anticipate a situation in which an individual could be both the minor victim and the individual charged. RCW 9.68A.001. An ordinary person would read the statute as the legislature intended: designed to protect children from abuse and exploitation by others, not as a tool to prosecute a teenager for sharing a photograph of himself. The statute is void for vagueness and reversal is required.

3. A limited construction of the RCW 9.68A.050 is necessary to save the statute from unconstitutional overbreadth and avoid absurd results.

a. A statute that is ambiguous as applied to particular facts must be construed to avoid absurd results.

A statute can survive an overbreadth challenge if the Court places a sufficiently limiting construction on the legislation, which prevents the law from applying to protected speech. Op. Br. at 20-22. The State claims the Court should not place a limiting construction on

RCW 9.68A.050 because the language of the statute is plain on its face. However, "[a] statute is ambiguous… when it is fairly susceptible to different, reasonable interpretations, either on its face *or as applied to particular facts*, and must be construed to avoid strained or absurd results." *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004) (emphasis added). When RCW 9.68A.050 is applied to the particular facts of this case it is susceptible to different, reasonable interpretations and the results – that Eric is both the minor to be protected, and the perpetrator to be prosecuted for victimizing himself – is absurd. This Court must read the statute so as to avoid such a result. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

b. <u>There is no support for the State's assertion that the legislature intended to prosecute the minor subjects in the images.</u>

The State also claims the Court should not place a limiting construction on the statute because the legislature *intended* to prosecute minors as felony sex offenders when they share an image of their own body. Resp. Br. at 7-8. Failing to find support in the stated findings and intent in RCW 9.68A.001 for this assertion, it relies on the statutory scheme, arguing that because other provisions of the statute severely restrict the dissemination of child pornography, this Court

should find the legislature intended to prosecute the minor subjects in the images. Resp. Br. at 7-8. This argument is meritless. The restrictions outlined in RCW 9.68A.170 (limiting the access of images as part of discovery), RCW 9.68A.180 (regulating the handling of the images as exhibits), and RCW 9.68A.190 (requiring the return of all images provided under color of law) offer no support for the State's position.

Similarly, the State's argument that the legislature could have carved out an exception in RCW 9.68A.110, in order to prevent the prosecution of children where the defendant is also the minor victim, does not demonstrate it was the legislature's *intent* to prosecute children like Eric. Resp. Br. at 7-8. This statutory provision provides for certain affirmative defenses, but also specifies what defenses are *not* available to a defendant. RCW 9.68A.110 (e.g. a defendant may not defend against the charges by showing he did not know the victim's age, but may defend against the charges by demonstrating he made a bona fide attempt to ascertain the true age of the minor). The fact that the legislature failed to make this defense available *or unavailable* to a juvenile defendant only undermines the State's argument, as it suggests

the legislature never contemplated the type of circumstances presented in this case.

This Court need not speculate on the legislature's intent, as the State proposes, because its intent was clearly articulated in RCW 9.68A.001. In this provision, the legislature stated, "It is the intent of the legislature to encourage these children to engage in prevention and intervention services and to hold *those who pay to engage in the sexual abuse of children* accountable for the trauma they inflict on children." RCW 9.68A.001 (emphasis added). The State attempts to distract from the legislature's clearly articulated intent with references to irrelevant statutory provisions and appeals to how "logical" it would have been for the legislature to criminalize a teenager's sharing of a nude photo.[3] Resp. Br. at 7-8. But the legislature was clear that its aim was to protect the children in the images from harm they may have endured at the hands of others, not criminalize a teenager's sharing of self-photography.

[3] The State's assertion, that is logical for the State to prosecute the minor subject of the image because the image may later fall into the hands of a child predator, defies reason.

c. That the language of the statute may result in other absurd results does not justify failing to place a limiting construction on the statute in order to address the facts presented in this case.

Finally, the State argues the Court should not construe the statute so as to preclude the prosecution of the minor subject of the image, because doing so would lead to an absurd result under different circumstances. Resp. Br. at 10. For example, under different facts the State would be prevented from prosecuting the minor subject of the image but permitted to prosecute the subject's teenage friend who assisted in sharing the image, simply because that friend was not also in the photograph. Resp. Br. at 10. However, these are not the facts before this Court.

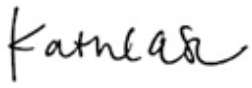
As recognized in the Appellant's Opening Brief, the overly broad language of the statute may result in a number of different absurd results. Op. Br. at 22, n. 7. While this supports a finding of facial invalidity, it certainly does not prevent the Court from placing a limiting construction on the statute in order to address the facts before the Court in this case. The juvenile court erred when it declined to read the statute as the legislature intended and dismiss the charge against Eric. This Court should reverse.

B. CONCLUSION

For the reasons stated above and in Eric G.'s opening brief, this Court should reverse.

DATED this 7th day of December, 2015.

Respectfully submitted,



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	)	
ERIC G.,	)	
	)	
JUVENILE APPELLANT.	)	

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