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

BRIEF OF APPELLANT

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

United States Supreme Court

Constitutional Provisions

Washington Statutes

Other Authorities

A. SUMMARY OF ARGUMENT

Eric G. has Asperger's Syndrome and suffers from mental health issues. When he was 17 years old, he sent a text message with a photograph of his penis to a woman who used to work for his mother. She contacted the police, and the State charged Eric with dealing in depictions of a minor engaged in sexually explicit conduct, a felony sex offense. The State alleged Eric was both the individual who committed the crime **and** the minor victim who was exploited by the crime.

B. ASSIGNMENTS OF ERROR

1. RCW 9.68A.050 is facially overbroad in violation of article I, section 5, and the First Amendment.

2. RCW 9.68A.050 is unconstitutionally vague in violation of due process.

3. Under a limited construction of RCW 9.68A.050, the juvenile court deprived Eric of his right to due process when it entered a conviction based on insufficient evidence.

4. The trial court erred when it entered finding of fact 3 in ruling on the motion to dismiss.

5. To the extent it is deemed to be a finding of fact, the trial court erred when it entered conclusion of law 1 in ruling on the motion to dismiss.

6. To the extent it is deemed to be a finding of fact, the trial court erred when it entered conclusion of law 3 in ruling on the motion to dismiss.

7. To the extent it is deemed to be a finding of fact, the trial court erred when it entered conclusion of law 1 at disposition.

8. To the extent it is deemed to be a finding of fact, the trial court erred when it entered conclusion of law 2 at disposition.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The freedom of expression is protected by article I, section 5 and the First and Fourteenth Amendments. When a statute prohibits a substantial amount of constitutionally protected conduct, it is facially invalid unless the Court is able to construe it in a way to sufficiently limit the statute's reach. Where the plain language of RCW 9.68A.050 allows the State to prosecute a minor for a felony sex offense for sharing a photograph of his own body, is the statute unconstitutionally overbroad?

2. A statute is void for vagueness under the Fourteenth Amendment and article I, section 3, when it fails to put ordinary people on notice of the conduct proscribed or when it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Where the statute does not provide notice to a minor that he can be convicted of a felony sex offense for sharing a photo of his own body, and where research suggests a significant number of teenagers engage in this behavior without facing a felony charge, is the statute unconstitutionally vague?

3. RCW 9.68A.050 can survive a facial challenge only if the Court can place a sufficiently limiting construction on the statute. A limiting construction would require, at minimum, that the statute be read as requiring the "person" who commits the crime and the "minor" depicted in the image be two different people. Was Eric convicted of a felony sex offense in violation of his Fourteenth Amendment and article I, section 3 right due process where there was insufficient evidence to find him guilty under this limited construction of the statute?

D. STATEMENT OF THE CASE

Eric G. suffers from mental health issues and a "significant Asperger's diagnosis." 2/28/14 RP 33. A woman named Taysha Rupert, who was previously employed by Eric's mother, reported to police that she received a text message with a picture of an erect penis from Eric and a message that included the statements: "Do u like it babe? It's for you Taysha Rupert." CP 67.

When Eric was questioned by police, his eyes watered and he began to stutter. CP 70. He admitted he had sent the image to Ms. Rupert, and that it was a photograph of his own penis. CP 70. Eric was 17 years old at the time. CP 66. The State charged Eric with dealing in depictions of a minor engaged in sexually explicit conduct, a felony sex offense, alleging Eric was both the person who committed the crime, by sending the photo, and the minor who was victimized by the dissemination of the photo, because it depicted his body. CP 1.

Eric moved to dismiss for insufficient evidence, arguing he could not be convicted for dealing in depictions for a minor engaged in sexually explicit conduct when he was the minor at issue and had voluntarily photographed and shared the image of his own body. CP 32-36. The trial court denied Eric's motion, finding there was

sufficient evidence under the plain language of the statute. CP 124. After a stipulated facts bench trial, Eric was convicted of this felony sex offense and sentenced to 30 days in custody with credit for time served. CP 98. Before imposing the sentence the juvenile court found several mitigating factors existed, including that Eric suffered "from a mental or physical condition that significantly reduced [his] culpability for the offense." CP 96. As required by law, the juvenile court directed him to register as a sex offender based on this conviction. CP 101.

E. ARGUMENT

1. RCW 9.68A.050 is unconstitutionally overbroad because it proscribes a substantial amount of constitutionally protected conduct.

Freedom of speech is protected by article I, section 5 and the First and Fourteenth Amendments to the United States Constitution.[1] These constitutional provisions provide significant protection from "laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *see also State v.*

[1] Article I, section 5 states, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The First Amendment directs that "Congress shall make no law… abridging the freedom of speech." The Fourteenth Amendment states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). Laws that burden expression are subject to challenge for being facially overbroad. *Id*. When a penal statute criminalizes behavior, this Court must examine the law with particular scrutiny. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000); *see also Free Speech Coalition*, 535 U.S. at 244 ("a law imposing criminal penalties on protected speech is a stark example of speech suppression").

Article I, section 5 offers greater speech protections than the First Amendment because it "categorically rules out prior restraints on constitutionally protected speech under any circumstances." *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988). However, an overbreadth analysis under article I, section 5, follows the analysis under the First Amendment. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

Typically, in order to succeed on a facial attack, the challenger must establish that no set of circumstances exist under which the statute is valid. *United States v. Stevens*, 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). However, when the statute is challenged under the First Amendment, it is overbroad if it "'sweeps within its prohibitions' a substantial amount of constitutionally protected

conduct." *Immelt*, 173 Wn.2d at 6 (quoting *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992)). If the Court is unable to construe the statute in such a way as to sufficiently limit the statute's reach, it is facially invalid. *Immelt*, 173 Wn.2d at 7. The burden is on the State to justify the infringement on speech in response to a First Amendment challenge. *Id*. at 6; *State v. Homan*, 181 Wn.2d 102, 111 n.7, 330 P.3d. 182 (2014).

a. RCW 9.68A.050 encompasses constitutionally protected speech.

i. *The Plain Language of the Statute Punishes a Minor's Sharing of his own Photo as a Felony Sex Offense*

In order to analyze an overbreadth challenge, the first step is to construe the challenged statute, as only by after examining what the statute covers may a court determine whether it reaches too far. *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). The relevant portion of RCW 9.68A.050 states:

> (1)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finances, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e);

…

> (2)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter than depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

The State prosecuted Eric under subsection (1)(a)(i) of the statute for sending a photo of his *own* penis in a text message. CP 1. The State alleged Eric was both the "person" who sent the image and the "minor" subject of the image.[2] *See* CP 52. The juvenile court denied Eric's motion to dismiss for insufficient evidence, finding the plain language of the statute allowed a minor to be prosecuted for sending an image or his own genitals because there was nothing in the plain language of the statute to indicate the "person" disseminating the image and the "minor" subject of the image be two different people. CP 124. The juvenile court then found Eric guilty under subsection (2)(a)(i).[3] CP 124 (Finding of Fact 3); CP 127 (Finding of Fact 3,

[2] RCW 9.68A.011(5) defines "minor" as "any person under eighteen years of age."

[3] The court found Eric guilty based on a finding that RCW 9.68A.011(4)(f) was satisfied, which includes "[d]epiction of the genitals or unclothed pubic or rectal areas of any minor… for the purpose of sexual stimulation of the viewer." Although the juvenile

Conclusions of Law 1-2). This is a class C felony that requires Eric to register as a sex offender. RCW 9.68A.050(2)(b); RCW 9A.44.140.

ii. *This Content-Based Restriction on Speech Does Not Serve a Compelling State Interest Because the Harm of Child Pornography is Based on the Production of the Image Rather Than its Content*

"Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny." *Williams*, 144 Wn.2d at 208 (quoting *Collier v. City of Tacoma*, 121 Wn.2d 737, 748-49, 854 P.2d 1046 (1993)). The burden is on the State to establish the statute is "narrowly tailored to promote a *compelling* Government interest." *Williams*, 144 Wn.2d at 211 (quoting *United State v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (emphasis original)); *see also Lorang*, 140 Wn.2d at 29.

The United States Supreme Court has held that the dissemination of obscene material is excluded from the protections of the First Amendment. *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In *New York v. Ferber*, the Court carved out an additional exception for the dissemination of child pornography, finding it unworthy of First Amendment protection regardless of

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court found Eric guilty of a lesser degree than was charged in the information, this discrepancy was not addressed by the parties or the juvenile court. CP 1, 127.

whether the material satisfied the more rigorous obscenity standard. 458 U.S. 747, 761, 102 S.Ct. 3348, 72 L.Ed.2d 1113 (1982). The Court found states were entitled to greater leeway in the regulation of pornographic depictions of children because "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id*. at 757.

Although the Court found "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling," it relied on the damage caused to children who are the subject of pornography disseminated by others, citing research that demonstrated "that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id*. at 756-57 (internal citation omitted), 759 n.9. It noted "[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution… A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." *Id*. at 760 n.10 (quoting Shouvlin,

Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L.Rev. 535, 545 (1981)).

Relying on the significant injury suffered by children during the production of child pornography, the Court in *Ferber* held that a New York law prohibiting individuals from distributing materials that promoted sexual performances by children under the age of 16 did not violate the First Amendment. *Id*. at 773. The Court found the statute was not unconstitutionally overbroad on its face because any impermissible application of the statute, such as depictions in medical textbooks or National Geographic, did not "amount to more than a tiny fraction of the materials within the statute's reach." *Id*. Instead, any overbreadth could be cured on a case-by-case basis. *Id*. at 773-4.

Similarly, in *Osborne v. Ohio*, the Court held the *possession* of child pornography was not entitled to First Amendment protection, despite the fact it had previously determined the possession of obscene material was protected by the First Amendment in *Stanley v. Georgia*, 394 U.S. 557, 564-68, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Osborne v. Ohio*, 495 U.S. 103, 111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The Court explained the difference between the possession of obscene material and the possession of child pornography as follows:

> In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

Osborne, 495 U.S. at 109 (internal citations omitted).

The Court further clarified this position in *Ashcroft v. Free Speech Coalition* when it struck down provisions of the Child Pornography Act of 1996 because the law extended the prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using real children. 535 U.S. at 250. The Court found the "images do not involve, let alone harm, any children in the production process" and that all of Congress's rationales for the ban stemmed from the *content* of the images, not from the *means of their production*. *Id*. at 241. For example, Congress feared that pedophiles might use the simulated images to encourage children to submit to a photograph, or that the images would increase demand for child pornography. *Id*. In addition, Congress feared that it

would be more difficult to prosecute cases if the law required the government to prove the image involved a real child. *Id*. The Court found these interests insufficient, and rejected the challenged provisions as overbroad in violation of the First Amendment. *Id*. at 256-57.

In *United States v. Williams*, by contrast, the Court upheld subsequent legislation that permitted the prosecution of individuals who promoted or solicited materials that involved "a visual depiction of an actual minor." 553 U.S. at 297. Once again, it relied on the fact the children were real, meaning the statute was limited to addressing the *harm* involved in the production, rather than the content of the image. *Id*. The court found "[s]imulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography." *Id*. at 303 (emphasis original); *see also Stevens*, 559 U.S. at 482 (finding a statute addressing only the *portrayal* of harmful acts against animals, not the underlying conduct, was overbroad and violated the First Amendment).

As these cases make clear, child pornography is excluded from the protections of the First Amendment based on the harm caused to the children in the production of the material. When a minor photographs

his own body and sends that image to another in an attempt to indicate romantic or sexual interest, the same compelling risk of physical and psychological injury does not exist.

iii. *No Claim of a Compelling State Interest was made by our Legislature*

Our legislature made no findings to the contrary when it enacted RCW 9.68A.050. In the statutory provision detailing its legislative findings and intent, the legislature asserts no interest in charging minors with a felony sex offense for photographing their own bodies and sharing the photos with others. RCW 9.68A.001. Instead, quoting directly from *Ferber*, the legislature found:

> [T]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.
>
> …
>
> The legislature further finds that children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse. Approximately eighty to ninety percent of children engaged in sexual activity for financial compensation have a history of sexual abuse victimization. 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; *see also Ferber*, 458 U.S. at 757.

Eric, as the minor subject at issue in this case, is both the person prosecuted for the conduct and the *victim* of the crime. The legislature's intent was to protect minor children and prosecute those who inflict trauma upon a child by making the child a subject of pornography. The legislature identifies no compelling interest in prosecuting a minor for a felony sex offense when this risk of harm is not present.

Indeed, it appears that the legislature did not even contemplate the use of the law against a juvenile who produces and disseminates images of his own body. *See* Joanna L. Barry, *The Child as Victim and Perpetrator: Laws Punishing Juvenile "Sexting,"* 13 Vand. J. Ent. & Tech. L. 129, 134-35 (2010) ("as one state's attorney has noted, legislators never contemplated 'children sharing images of themselves' even though teenage sexting 'might squeeze into the literal definition of child pornography.'" (internal citation omitted)). The State cannot meet its burden of demonstrating a compelling interest that justifies this infringement on a minor's freedom of expression. *See Lorang*, 140 Wn.2d at 29. Because the statute infringes upon constitutionally

protected speech, this Court must determine whether it does so in a way that is unconstitutionally overbroad. *Id*. at 26.

b. RCW 9.68A.050 is facially invalid.

Once the Court determines the scope of the statute's reach, the inquiry turns to whether the statute "criminalizes a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 297; *Lorang*, 140 Wn.2d at 26-27. Criminal statutes may be facially invalid if they "make unlawful a substantial amount of constitutionally protected conduct… even if they also have legitimate application." *Williams*, 144 Wn.2d at 208 (quoting *State v. Lee*, 135 Wn.2d 369, 388, 957 P.2d 741 (1998)).

In contrast to the concerns in *Ferber*, here the statute's overbreadth is substantial, both in the absolute sense and relative to the statute's plainly legitimate sweep. *See Ferber*, 458 U.S. at 773; *Williams*, 553 U.S. at 292. The sharing of sexually suggestive images and content among teenagers over text message is so common that it has its own term: "sexting."[4] Twenty percent, or one in five, teenagers admit to producing and distributing nude or semi-nude pictures of

[4] "Sexting" is defined in the dictionary as "the sending of sexually explicit messages or images by cell phone." http://www.merriam-webster.com/dictionary/sexting (las accessed July 15, 2015).

themselves. John A. Humbach, *'Sexting' and the First Amendment*, 37 Hastings Const. L.Q. 433, 435 (2010); The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults* at 1 (2008).[5]

This number does not capture the number of teenagers who engage in the behavior but deny it, nor does it account for the instances in which the image is forwarded on to an additional recipient. Twenty-five percent of teenage girls, and thirty-three percent of teenage boys, say they have had nude or semi-nude images shared with them that were originally meant for someone else. The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *supra* at 3. Both minors who produce and send images of themselves and minors who forward on those images to a peer could be prosecuted under RCW 9.68A.050.[6]

As Justice Gonzalez stated in his concurrence in *State v. E.J.J.*, "[w]e should not criminalize and pathologize typical juvenile behavior." __ U.S. __, 2015 WL 3915760 at *15 (No. 88694-6, June

[5] Available at http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf (last accessed July 15, 2015).

[6] While there is no suggestion Eric forwarded an image of another minor, when evaluating an overbreadth challenge the Court should consider all the protected expression encompassed by the statute, not just the conduct engaged in by the defendant. *See Immelt*, 173 Wn.2d at 7 ("An overbreadth challenge allows 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct should not be regulated by a statute drawn with the requisite narrow specificity.'" (internal citation omitted)).

25, 2015) (Gonzalez, J. concurring). The language of RCW 9.68A.050 as applied here does exactly that, as it permits at least one in five teenagers to be prosecuted as a felony sex offender. Because the sharing of self-produced sexually-explicit images over text message is common among minors, the statute criminalizes a substantial amount of protected expressive activity. The statute is unconstitutionally overbroad in violation of article I, section 5, and the First Amendment, and reversal is required. *See Immelt*, 173 Wn.2d at 14 (finding the statute failed constitutional scrutiny and reversing the defendant's conviction).

2. RCW 9.68A.050 is unconstitutionally vague.

"The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, __ U.S. __, 2015 WL 2473450 at *4 (No. 13-7120, June 26, 2015); U.S. Const. amend. IV; Const. art. I, § 3. A statute is void for vagueness if either:

> (1) The statute "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed"; or (2) the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement."

Lorang, 140 Wn.2d at 30 (quoting *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). This Court must be "especially cautious" in the interpretation of a statute when First Amendment interests are at stake because a vague statute inhibits the exercise of the constitutional right to free expression. *Lorang*, 140 Wn.2d at 31; *Williams*, 144 Wn.2d at 204.

RCW 9.68A.050 fails both prongs of the test. An ordinary person reading the statute would interpret it as the legislature intended: that a person is guilty of dealing in depictions of a minor engaged in sexually explicit conduct when he disseminates an image of a minor, *other* than himself, to another. Eric's conviction of a felony sex offense under this statute for sending a photo of his own body to someone else demonstrates that the statute fails to define the offense with sufficient definiteness to allow ordinary people to understand when they may be charged under this law, as the statute does not provide sufficient notice that this behavior is proscribed.

In addition, the statute is extremely susceptible to arbitrary enforcement. Research suggests that at least one in five teenagers has shared a self-produced nude image. The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *supra* at 1. The prosecution and

conviction of Eric for a felony sex offense while the majority of these teenagers never face prosecution shows the statute is not applied uniformly but instead subject to the whims of the State.

"Laws may not 'trap the innocent by not providing fair warning' or delegate 'basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Lorang*, 140 Wn. At 30 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). Despite the fact that no children had been exploited or abused by his actions, the State elected to prosecute Eric for a felony sex offense. RCW 9.68A.050(2)(b); RCW 9A.44.140. Eric was not provided fair warning that he engaged in conduct that violated this statute or constituted a sex offense, and the State's decision to prosecute him was an arbitrary application of the law. The Statute is void for vagueness and reversal is required.

3. There is insufficient evidence for Eric's conviction under a limited construction of RCW 9.68A.050.

When a statute reaches protected conduct, it can survive an overbreadth challenge if the Court is able to place a sufficiently limiting construction on the legislation. *Luvene*, 118 Wn.ed at 840. Once this Court "construes a statute or ordinance, that construction

becomes as much a part of the legislation as if it were originally written into it." *O'Day*, 109 Wn.2d at 807. The statute is no longer overbroad because the Court's authoritative construction prevents the law from applying to protected speech. *Id*.

When examining a statute, the language must be read within the context of the whole statute and larger statutory scheme, rather than in isolation. *City of Auburn v. Guantt*, 174 Wn.2d 321, 330, 274 P.3d 1033 (2012). Where there is ambiguity, the rule of lenity requires the statute be interpreted in favor of the defendant. *State v. Hall*, 168 Wn.2d 726, 736-37, 230 P.3d 1048 (2010) ("It seems unlikely that the legislature intended that a person could be prosecuted for over a thousand crimes under the circumstances presented here.").

The juvenile court erred when it declined to read the statute as the legislature intended and dismiss the charge against Eric,. CP 124-25 (Finding of Fact 3, Conclusions of Law 1, 3); CP 127 (Conclusions of Law 1, 2). Given the legislature's expressly-stated intent to prosecute individuals who exploit and abuse children, not the children themselves, the statute must be construed to require the "person" who commits the crime be a different individual than the "minor" depicted.

So construed, the evidence in this case fails to support a conviction.[7] *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006) ("Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt."); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. IV; Const. art. I, § 3. Reversal is required.

[7] This construction, however, does not save the statute from facial invalidity, as the limitation does not prevent the State from prosecuting teenagers for forwarding text messages to their peers under RCW 9.968A.050. Had Eric sent the photo to a friend, who forwarded it to another friend, the teenager who forwarded the photo could be convicted under RCW 9.68A.050, even if application of the statute was limited to requiring the "person" and the "minor" be two different individuals. This Court should find the statute unconstitutionally overbroad and void for vagueness. In the alternative, this Court should reverse Eric's conviction for insufficiency of the evidence.

F. CONCLUSION

Eric G. respectfully asks this Court to reverse his conviction because RCW 9.68A.050 is unconstitutionally overbroad in violation of article I, section 5, and the First Amendment. Second, reversal is required because the statute is unconstitutionally void for vagueness. Finally, if the Court determines the statute may be narrowly construed to save it from facial invalidity, Eric G.'s conviction should be reversed for insufficient evidence.

DATED this 17th of July, 2015.

Respectfully submitted,

_____

KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 32354-4-III
	)	
E.G.,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] E.G. 205 EAST WESTVIEW AVE APT 2 SPOKANE, WA 99218-1545	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JULY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710