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Court of Appeals

Division III

State of Washington

Supreme Court No.: 936099
Court of Appeals No.: 32354-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

E.G.,

Petitioner.

FILED
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WASHINGTON STATE
SUPREME COURT

PETITION FOR REVIEW

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A. INTRODUCTION

E.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 E.G. with dealing in depictions of a minor engaged in sexually explicit conduct, a felony sex offense. The State alleged E.G. was both the perpetrator who committed the crime and the minor victim who was exploited by the crime, and the trial court convicted E.G. after a stipulated facts bench trial. The Court of Appeals affirmed E.G.'s conviction in a published opinion.

This case presents a statutory construction issue of first impression and important constitutional questions regarding whether the statute is unconstitutionally overbroad and vague. This Court should grant review.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

E.G. requests this Court grant review pursuant to RAP 13.4(b) of the published decision of the Court of Appeals, Division Three, in *State v. E.G.*, No. 32354-4-III, filed June 14, 2016. A copy of the opinion is attached as Appendix A. E.G.'s motion for reconsideration was denied July 28, 2016. A copy of this order is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed E.G.'s conviction for dealing in depictions of a minor engaged in sexually explicit conduct, finding the statute permitted the State to charge the minor victim as the perpetrator where the minor had photographed and shared an image of his own body. Issues of first impression regarding statutory construction are matters of substantial public interest that should be reviewed by this Court. Should this Court grant review to determine whether RCW 9.68A.050 permits the minor victim and the perpetrator to be the same individual? RAP 13.4(b)(4).

2. Child pornography is unworthy of First Amendment protection because of the compelling interest in protecting children from exploitation and abuse. Under *Ashcroft v. Free Speech Coalition*¹, this ban is justified not by the content of the images, but the means of production typically required to create the images. Where there is no harm to a child, the material is protected by the First Amendment. Should this Court accept review to address the important constitutional question of whether RCW 9.68A.050 is unconstitutionally overbroad in criminalizing a minor's sharing of an image of his own body? RAP 13.4(b)(3), (4).

¹ 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

3. A statute that does not define a criminal offense with sufficient definiteness or does not provide ascertainable standards of guilt to protect against arbitrary enforcement violates Due Process. The language in RCW 9.68A.050 allowed for the prosecution of E.G. for sharing an image of his own body despite the fact that the statute is more sensibly interpreted as the legislature intended, to protect the minor in the image from being abused or exploited by another. Should review be granted to consider the important constitutional question of whether the statute is unconstitutionally vague in violation of Due Process? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

E.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 E.G.’s mother, reported to police that she received a text message with a picture of an erect penis from E.G. and a message that included the statements: “Do u like it babe? It’s for you Taysha Rupert.” CP 67.

When E.G. 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. E.G. was 17 years old at the time, and only three months shy of his eighteenth birthday. CP

66-67. The State charged E.G. with dealing in depictions of a minor engaged in sexually explicit conduct, a felony sex offense, alleging E.G. 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.

E.G. moved to dismiss for insufficient evidence, arguing he could not be convicted for dealing in depictions of 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 E.G.'s motion, finding there was sufficient evidence under the plain language of the statute. CP 124. After a stipulated facts bench trial, E.G. 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 E.G. 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. The Court of Appeals affirmed E.G.'s conviction. Slip Op. at 13.

E. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. **This Court should grant review because the legislature did not intend for a minor victim under RCW 9.68A.050 to be charged as the perpetrator for sharing an image of his own body.**

When interpreting the meaning and scope of a statute, this Court's "fundamental objective is to determine and give effect to the intent of the legislature." *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). If a literal reading of the statute would result in unlikely, absurd, or strained consequences, then the principles of statutory construction require that the Court avoid that reading. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). "The spirit or purpose of an enactment should prevail over... express but inept wording." *Id.* (quoting *State v. Day*, 96 Wn.2d 646, 638 P.2d 546 (1981)).

The State prosecuted E.G. under RCW 9.68A.050 for sending a photo of his own penis to a woman in a text message. According to the relevant portion of this statute:

- (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 that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).^[2]

RCW 9.68A.050.

The State alleged E.G. was both the “person” who committed the crime and the “minor” victimized by the crime. CP 1, 52. The trial court found E.G. guilty after denying his motion to dismiss for insufficient evidence. CP 124 (Finding of Fact 3); CP 127 (Finding of Fact 3, Conclusions of Law 1-2). The court found the plain language of the statute allowed a minor to be prosecuted for sending an image of his own genitals because there was nothing in this language requiring the “person” disseminating the image and the “minor” subject of the image be two different people. CP 124. It refused to apply the principles of statutory construction, as it failed to recognize it had a duty to avoid absurd consequences even if it found the language plain on its face. CP 124 (Finding of Fact 3).

A natural reading of the statute is that the minor victim is someone other than the perpetrator of the crime, and the legislature’s stated intent supports this natural reading. The legislative findings demonstrate the legislature did not intend for the State to charge minors with a felony sex

² The court found E.G. 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.”

offense for photographing their own bodies and sharing the photos with others. RCW 9.68A.001. These findings state:

[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 (emphasis added). Further, under the canon of constitutional avoidance, where there are two plausible readings of a statute the Court should choose the reading that avoids constitutional concerns. *Clark v. Martinez*, 542 U.S. 371, 381, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005).

The Court of Appeals affirmed E.G.'s conviction after finding the legislature sought to eradicate child pornography because it "per se" victimizes children, regardless of whether the minor is engaging in self-photography. Slip Op. at 11. However, the legislature's stated intent

demonstrates that the purpose of the enactment is to protect children who suffer abuse or exploitation by another. Such abuse or exploitation did not occur in E.G.'s case, and the legislature's explicitly stated purpose should prevail over the inept wording of the statute. *Fraternal Order of Eagles, Tenino Aerie No. 564*, 148 Wn.2d at 239.

Statutory interpretation is an issue of substantial public importance. RAP 13.4(b)(4); *see Larson*, 184 Wn.2d at 848; *State v. Moeurn*, 170 Wn.2d 169, 240 P.2d 1158 (2010); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009). This Court should grant review.

2. Review should be granted because RCW 9.68A.050 is unconstitutionally overbroad under *Ashcroft v. Free Speech Coalition*.

If the statute is interpreted to criminalize a minor's sharing of an image of his own body, then it burdens the freedom of expression and is subject to challenge under the First and Fourteenth Amendments and article I, section 5. U.S. Const. Amends. I. XIV; Const. art. I, § 5. 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. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001).

Content-based restrictions on speech, such as the restriction in RCW 9.68A.050, are presumptively unconstitutional and subject to strict scrutiny. *Williams*, 144 Wn.2d at 208. 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 City of Bellevue v. Lorang*, 140 Wn.2d 19, 29, 992 P.2d 496 (2000). If the statute is determined to reach protected conduct, it can survive an overbreadth challenge only if the Court is able to place a sufficiently limiting construction on the legislation. *City of Tacoma v. Luvane*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992); *O’Day v. King County*, 109 Wn.2d 796, 807, 749 P.2d 142 (1988).

The Court of Appeals rejected E.G.’s overbreadth challenge, relying primarily on *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Slip Op. at 6. In doing so, the court ignored the United States Supreme Court’s later holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. at 241.

In *Ferber*, the Court carved out an exception for the dissemination of child pornography, finding it unworthy of First Amendment protection regardless of whether the material satisfied the more rigorous obscenity

standard articulated in *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *Ferber*, 458 U.S. at 761. 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.

Relying on this analysis in *Ferber*, the Court of Appeals affirmed E.G.’s conviction after opining that exempting self-photography by minors would frustrate efforts to combat child pornography. Slip. Op. at 6. However, this was precisely the rationale rejected in *Free Speech Coalition*, 535 U.S. at 241.

When it reached its conclusion in *Ferber*, the United States Supreme Court relied on the significant injury suffered by children during the production of child pornography. 458 U.S. at 773. Consistent with this analysis, the Court later struck down provisions of the Child Pornography Act of 1996 in *Free Speech Coalition* 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.

In *Free Speech Coalition*, 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.* The Court found these interests insufficient, and rejected the challenged provisions as overbroad in violation of the First Amendment. *Id.* at 256-57.

Thus, *Free Speech Coalition* explicitly rejected the type of argument espoused by the Court of Appeals, that E.G.'s act fell outside the protection of the First Amendment because exempting self-photography would "frustrate efforts to combat child pornography." 535 U.S. at 241. Under *Free Speech Coalition*, the restriction on free speech in RCW 9.68A.050 must be based on the harm to the child, not the content of the images. *Id.*; see also *People v. Gerber*, 196 Cal. App. 4th 368, 386, 126 Cal.Rptr.3d 688 (2011) (finding that the possession of images with a child's head on an adult body was protected by the First Amendment under *Free Speech Coalition* because it did not necessarily involve the sexual exploitation of a child).

The same compelling risk of physical and psychological injury does not exist when the minor at issue has voluntarily photographed and shared an image of himself, and our legislature did not purport to

criminalize this behavior in its findings. RCW 9.68A.050. Instead these findings, which quote directly from *Ferber*, focus on the trauma and abuse of children that is typically involved in the production of child pornography. RCW 9.68A.001; *see also Ferber*, 458 U.S. at 757. It does not appear the legislature ever contemplated the use of the law against a juvenile who produces and disseminates images of his own body.

This Court should grant review to determine whether RCW 9.68A.050 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments and article I, section 5. This issue raises an important constitutional question and is of substantial public interest. RAP 13.4(b)(3), (4).

3. This Court should grant review because RCW 9.68A.050 is unconstitutionally vague.

RCW 9.68A.050 violates the Fourteenth Amendment and article I, section 3, because it is unconstitutionally vague. U.S. Const. XIV; Const. art. I, § 3. “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. __, 135 S.Ct. 2551, 192 L.Ed.2d (2015). 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)).

The Court of Appeals rejected E.G.’s vagueness challenge because it determined the words “minor” and “person” required no interpretation. Slip. Op. at 8. However, when considering a vagueness challenge the terms of the statute should not be viewed in a vacuum. *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). The context of the entire enactment must be considered and the language must be “afforded a sensible, meaningful, and practical interpretation.” *Id.* Where a criminal statute invites an inordinate amount of police discretion, it violates Due Process. *Id.*

When considered in isolation, the words “minor” and “person,” are plain on their face, and “minor” is defined in the statute. RCW 9.68A.011(5). However, when these words are reduced to their literal meaning without consideration of the context provided by the rest of the statute, the sensible and practical interpretation of the statutory language risks being discarded and, as occurred here, can result in the charge of the minor victim as the perpetrator. Such an interpretation directly contradicts

the legislature's stated findings that minors require protection from people who seeks to abuse and exploit them. RCW 9.68A.001.

"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)). Research has shown that approximately twenty percent, or one in five, teenagers admit to producing and distributing nude or semi-nude pictures of themselves. John A. Humbach, '*Sexting*' and the First Amendment, 37 Hastings Const. L.Q. 433, 435 (2010). The ambiguous language of the statute, which allows for a literal interpretation that conflicts with the legislature's stated intent, allows for the arbitrary enforcement of the law among teenagers who engage in these acts. Slip Op. at 8-9.

The statute is unconstitutionally vague. This Court should grant review to consider this important constitutional question and issue of substantial public interest. RAP 13.4(b)(3), (4).

F. CONCLUSION

This Court should grant review of the Court of Appeals opinion affirming E.G.'s conviction for dealing in depictions of a minor engaged in sexually explicit conduct where the State alleged he was both the minor victim and the perpetrator of the crime when he shared an image of his own 17-year-old body.

DATED this 29th day of August, 2016.

Respectfully submitted.



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APPENDIX A

COURT OF APPEALS, PUBLISHED DIVISION III OPINION

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32354-4-III
)	
v.)	
)	
E.G., [†])	PUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — A juvenile was convicted of second degree dealing in depictions of a minor engaged in sexually explicit activity for texting a picture of his erect penis to an adult female. We conclude that the statute does cover this conduct and affirm the juvenile court disposition.

FACTS

E.G. began sending harassing phone calls to T.R., a former employee of E.G.'s mother. T.R. at the time was a 22-year-old mother of an infant daughter. E.G. found T.R.'s telephone number by checking his mother's business records.

Beginning in mid-2012, a male using a restricted phone number would call T.R. at night and make sexual sounds or ask sexual questions. On the afternoon of June 2, 2013, T.R. received two text messages: one with a picture of an erect penis, and the other with

[†] For purposes of this opinion, the juvenile's initials are used in place of his name.

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the message, "Do u like it babe? It's for you [T.R.]. And for Your daughter babe." T.R. reported the phone calls and text messages to the police, who tracked the telephone to E.G., then age 17. He was questioned by the police and told them that it was his penis in the photograph.

Shortly before his 18th birthday, E.G. was charged in the juvenile division of the Spokane County Superior Court with one count of second degree dealing in depictions and one count of making harassing telephone calls. The court soon thereafter entered an order extending the juvenile court's jurisdiction. E.G. also was then currently serving a Special Sex Offender Dispositional Alternative (SSODA) as the result of an earlier adjudication for communicating with a minor for immoral purposes.

The defense eventually moved to dismiss the charges on two bases, including an argument that the dealing in depictions statute could not be applied to a minor who was also the "victim" of the offense. The trial court denied the motion and the parties promptly reached a disposition. The parties stipulated to the facts of the dealing in depictions charge, stipulated to revocation of the current SSODA due to failure to make progress in treatment, and agreed to dismiss the telephone harassment count and unrelated pending counts of indecent exposure.¹ The trial court concluded E.G. had committed the offense of second degree dealing in depictions of a minor engaged in

¹ E.G. was allegedly masturbating on a bus on his way to school.

sexually explicit conduct. The trial court imposed a mitigated² sentence of time served and required him to register as a sex offender.

E.G. then timely appealed. This court accepted an amicus brief jointly filed by the American Civil Liberties Union of Washington and the Juvenile Law Center. The parties subsequently presented oral argument to a panel of this court.

ANALYSIS

The only issue in this appeal is whether the dealing in depictions statute properly could be applied to E.G.'s conduct. He argues that the statute is unconstitutional under both the First and Fourteenth Amendments to the United States Constitution.³ Amici reprise E.G.'s trial court argument that the statute should be interpreted in a manner that permits a juvenile to distribute sexually explicit pictures of himself. We address the three arguments in the order noted.

The statute in question is RCW 9.68A.050(2)(a), which defines the offense of second degree dealing in depictions of minors engaged in sexually explicit conduct. It states:

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

² E.G. suffers from Asperger's syndrome, which the trial court found to play a significant part in the failure of treatment.

³ E.G. also argues that the evidence was insufficient to support the conviction if his behavior was constitutionally protected expression. Since we reject his constitutional arguments, we need independently consider this argument.

matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g); or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

The only definition referenced in the statute that has application to this case is found in RCW 9.68A.011(4)(f). That statute defines “[s]exually explicit conduct” to include:

Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.

Id.

We now consider the challenges raised, turning initially to the First Amendment argument set forth by E.G.

First Amendment

E.G. argues that his conduct was protected by the First Amendment. Specifically, E.G. argues that his transmission of the photograph was protected, expressive conduct and that in prohibiting self-produced depictions, the statute sweeps too broadly, rendering it unconstitutional. However, minors have no superior right to distribute sexually explicit materials involving minors than adults do.

In determining the constitutionality of a statute, this court starts with a presumption that the statute is constitutional and reviews challenges de novo. *Lummi*

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Indian Nation v. State, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010). A party may challenge the constitutionality of a statute as applied in the specific context of that party's actions, or alternatively may facially challenge the statute as unconstitutional in all of its applications. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). To prevail on the former, the party must show a violation of a constitutional right. *Id.* To prevail on the latter, the party must show that no set of circumstances exists in which the statute can be constitutionally applied. *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). Holding a statute to be unconstitutional as applied will prevent future application of that statute in similar circumstances, while holding a statute facially unconstitutional renders it totally inoperative. *Id.*

Because of the important rights protected by the First Amendment, a party may challenge a statute on its face as being overbroad regardless of whether that party's rights are affected. *State v. Motherwell*, 114 Wn.2d 353, 370-71, 788 P.2d 1066 (1990). "A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities." *Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). While it is inherently "dangerous" to regulate any form of expression, certain categories of expression are exempt from First Amendment protections. *New York v. Ferber*, 458 U.S. 747, 754-55, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). One such category is child pornography. In light of the State's interest in safeguarding the physical and

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psychological well-being of minors, the United States Supreme Court determined that *all* child pornography is exempt from First Amendment protection. *Id.* at 764-65; *see also State v. Luther*, 157 Wn.2d 63, 70-71, 134 P.3d 205 (2006).

E.G. argues that the goal of protecting minors from abuse and exploitation is not served by prohibiting self-produced child pornography. Consequently, he contends that self-produced child pornography should be excluded from the exemption. However, one of the primary purposes of child pornography statutes is to restrict the distribution network for child pornography in order to eliminate the market for producing the materials. *Ferber*, 458 U.S. at 759. Exempting self-produced images simply affords putative child pornographers the opportunity to purchase child pornography directly from voluntary, consenting minors, or else encourages minors to produce and market their own child pornography. Such exemptions would significantly frustrate efforts to combat child pornography.

An exemption for minors would also constitute a significant expansion of their First Amendment privileges in this area. States are permitted to prohibit the sale to minors of non-obscene sexually-oriented materials that can be sold to adults. *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (upholding New York ban on sale of "girlie" magazines to those under 17). If the First Amendment does not require a minor to have access to non-obscene materials that are available to adults, it does not afford them a privilege to produce or distribute sexually explicit materials.

The First Amendment does not consider child pornography a form of protected expression. There is no basis for creating a right for minors to express themselves in such a manner, and, therefore, no need to place a limiting construction on a statute that does not impinge on a constitutional right. Accordingly, we conclude that the dealing in depictions of minors statute does not violate the First Amendment when applied to minors producing or distributing sexually explicit photographs of themselves.

Vagueness

E.G. next contends that the dealing in depictions statute is vague because it does not provide notice that sending self-produced images of one's own genitalia to others is included within the scope of the statute. While the statute's reach may be broad, it is not vague.

"Under the Fourteenth Amendment, a penal statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988). Moreover, "where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential." *Id.* The vagueness doctrine serves both "to provide citizens with fair warning of what conduct they must avoid" and protect from arbitrary law enforcement. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). E.G. contends that the dealing in depictions statute fails

both prongs of the vagueness test because a minor would not know that it applied to pictures he had taken of himself.

The problem with this argument is that it is made without reference to any language in the statute. Rather, he has essentially argued that an ordinary person would not expect sending a picture of himself to be covered under the crime of dealing in child pornography. However, the language of the statute is plain and not vague. It prohibits “a person” from disseminating sexually explicit pictures of “a minor.” RCW 9.68A.050(2)(a). Nothing in the text of the statute suggests that there are any exceptions to its anti-dissemination or anti-production language. The statute is aimed at eliminating the creation and distribution of images of children engaged in explicit sexual behavior. It could hardly be any plainer and does not remotely suggest there is an exception for self-produced images.

E.G. also contends that the statute is vague because 20 percent⁴ of teenagers allegedly engage in “sexting,” the transmission of sexually suggestive or explicit

⁴ E.G. cites a survey conducted in 2008 by The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* 1, http://denp9zinex7nzb.cloudfront.net/sites/default/files/resouce-primary-download/sex_and_tech_summary.pdf. That same source three years later noted in a blog entry that a new study conducted in 2011 showed that the actual number might only be two percent had “sexted” and discussed methodological differences between the two surveys. Bill Albert, *Sexting Redux*, NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY (Dec. 6, 2011), <http://thenationalcampaign.org/blog/sexting-redux>. The new study in question was created by the University of New Hampshire Crimes Against Children Research Center and published in *Pediatrics*. Kimberly J. Mitchell et al.,

photographs via cell phone,⁵ and therefore could be subject to prosecution. His argument, even if the facts supported the claim, is irrelevant. The fact that a large number of people do something is not the test of whether police or prosecutors arbitrarily enforce a law, nor does not tell us whether it is vague. If a large number of people, especially those charged with enforcing the law, do not understand what a statute means, then the law may be vague and subject to arbitrary enforcement, leading to its demise as a matter of due process. But ignorance of a law is not the same as ignorance of the meaning of a law. The fact that minors may not appreciate they are breaking a law is not proof that they do not understand it.

But, the test of vagueness is whether an *ordinary person* would understand the meaning of the statute. *Halstien*, 122 Wn.2d at 117. It is the burden of the challenger to establish that the statute is vague. *Id.* at 118. E.G. does not attempt to meet that burden in this appeal. He can point to no ambiguity in the text nor otherwise show that the statute is not understandable. It does not bear the interpretation he desires, but it is not for that reason unconstitutionally vague.

Prevalence and Characteristics of Youth Sexting: A National Study, 129 PEDIATRICS 13 (2012). The New Hampshire study suggested that less than two percent of teens had sent pictures of explicit images, while nearly ten percent had been involved with sexually suggestive images. *Id.* at 18. It also noted that transmission of sexually explicit pictures constituted criminal behavior, leading to the need to inform teens of the issue and of creating less draconian methods of addressing the problem. *Id.* at 18-19.

⁵ <http://www.merriam-webster.com/dictionary/sexting> (last visited June 7, 2016).

The vagueness argument is without merit.

Statutory Construction

Amici argue, for factual considerations similar to those made by E.G. and for policy reasons discussed briefly below, that the dealing in depictions statute should be interpreted to exclude minors who send pictures of themselves, thereby ensuring that sexting does not fall within the reach of the statute. This, however, is not a sexting case—and we do not opine on whether the dealing in depictions statute would apply to a minor sending a picture of herself to a willing minor recipient—and the statute simply does not bear the construction the amici would give it.⁶

The terms of the statute are clear—“[a] person” who disseminates sexually explicit photographs of “a minor” violates the statute. Like E.G., the amici do not argue that there is any ambiguity in the terms of the statute. Instead, pointing to the statement of intent adopted by the legislature, they argue that it is not rational that E.G. can both be the victim of the offense and the perpetrator. There are a couple of problems with that argument.

⁶ Appellate courts do not typically address issues raised only by an amicus. *E.g.*, *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). Here, however, the amici are raising the same issue argued by E.G. to the trial court, and counsel for E.G. at oral argument expressly indicated that her client joined the argument. Since the State did answer the argument in its response to the amici, it is not unfair to any party to address the claim. The issue is properly before us.

Although there is no ambiguity in the statute that would require a reviewing court to construe the statute with regard to legislative intent, the amici properly nonetheless note that statutes should be interpreted to avoid absurd results. *E.g., Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011).⁷ They argue that it would be absurd for E.G. to be both victim and perpetrator. We disagree. First, nothing in the statute requires proof of any specific “victim” status as an element of the offense. Rather, child pornography per se victimizes children, which is the reason the legislature is seeking to eradicate it, whether or not the child willingly takes part.⁸ The legislature can rationally decide that it needs to protect children from themselves by eliminating all child pornography, including self-produced images that were not created for commercial reasons.⁹

The second reason that this is not a case of innocent sharing of sexual images between teenagers. It appears, instead, to be the latest step in a campaign of anonymous

⁷ Although it is important to avoid absurd consequences, this doctrine is applied sparingly. *Five Corners*, 173 Wn.2d at 311.

⁸ Even if typical sexting initially is treated as innocent activity, there is still a significant risk of harm when one of the recipients subsequently shares the images with others, whether the new recipients are peers or adults. The studies noted *supra* note 4 show that further transmission of shared images to others is a common occurrence and an easy way to misuse “innocent” sharing to victimize a minor.

⁹ There are many circumstances where the legislature uses the criminal law to restrict the ability of minors to harm themselves or other minors, including the laws against child rape and molestation, as well as the use of alcohol by minors. *See, e.g.*, RCW 9A.44.073-.089; RCW 66.44.270(2).

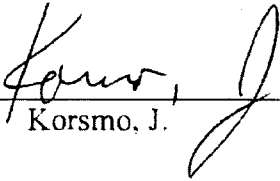
harassment of T.R. for reasons best known to E.G., but even if it was an effort to entice or impress her, this was not an innocent activity. For this reason, most of the amici policy arguments simply are not applicable here. Furthermore, since E.G. was already a registered sex offender with an obligation to report, there is no danger that he was being subject to public opprobrium through an innocent mistake. Similarly, he was already undergoing, albeit unsuccessfully, sex offender treatment through the rehabilitative auspices of the juvenile court. Further prosecution in juvenile court for the messages sent to T.R. did not undercut the rehabilitation efforts underway there; indeed, prosecution of this case as a dealing in depictions charge may have been the only way to keep him before the juvenile court. E.G. did not succeed due to his own behavior and his own challenges. The prosecution of this case did not undercut the therapeutic ideals of juvenile court.

Amici make a strong policy argument that sexting cases should not be treated under the dealing in depictions statute. The prosecutor agreed at oral argument that prosecutors typically would not charge such cases under that law. Since this was not a sexting case, this court need not weigh in on that issue now. But if this statute needs to be amended to ensure that policy—or some other statute needs to be enacted to address the problem, then the legislature is the body that must act. Amici's policy arguments are best addressed to that body.

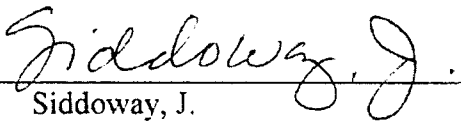
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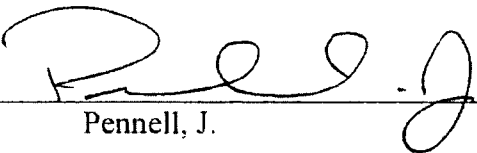
State v. E.G.

Accordingly, we affirm the juvenile court's adjudication and disposition of this case.


Korsmo, J.

WE CONCUR:


Siddoway, J.


Pennell, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

July 28, 2016

FILED
July 28, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 32354-4-III
)	
Respondent,)	
)	
v.)	ORDER DENYING
)	MOTION FOR
E.G., [†])	RECONSIDERATION
)	
Appellant.)	

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 14, 2016 is hereby denied.

PANEL: Judges Korsmo, Siddoway, Pennell

FOR THE COURT:



GEORGE FEARING
Chief Judge

[†] For purposes of this order, the juvenile's initials are used in place of his name.

STATE OF WASHINGTON,

RESPONDENT,

V.

E.G.,

PETITIONER.

COA NO. 32354-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** 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:

[X] GRETCHEN VERHOEF

[SCPAappeals@spokanecounty.org]

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U.S. MAIL

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HAND DELIVERY

(X)

AGREED E-SERVICE

VIA COA PORTAL

[X] E.G.

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APT. 2

SPOKANE, WA 99218

(X)

U.S. MAIL

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HAND DELIVERY

$$\left(\begin{array}{c} \cdot \\ \cdot \\ \cdot \end{array} \right)$$

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2016.

X

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