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Court of Appeals
Division I
State of Washington

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WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO. 94608-6

NO. 74310-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Petitioner.

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

The Honorable Millie D. Judge, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jameel Padilla this Court to grant review of the court of appeals' unpublished decision in State v. Padilla, No. 74310-4-1, filed April 24, 2017 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Is this Court's review warranted under RAP 13.4(b)(3) to determine whether it is an essential element of viewing depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.075, that the defendant knew the person depicted was a minor, and that element must therefore be included in the to-convict instruction and the charging document?

C. STATEMENT OF THE CASE

The State charged Padilla with two counts of first degree and two counts of second degree viewing depictions of a minor engaged in sexually explicit conduct. CP 104-05. The State alleged Padilla intentionally viewed visual or printed matter of a minor engaged in sexually explicit conduct over the internet in four separate and distinct internet sessions. CP 104-05. A jury found Padilla guilty as charged. CP 74-77.

1. Trial Proceedings

At trial on the viewing charges, Detective Aaron DeFolo testified an investigation by the Arroyo Grande Police Department in California led

them to Padilla's internet protocol (IP) address in Everett, Washington. 2RP 62-63. On September 12, 2012, DeFolo executed a search warrant at Padilla's apartment and seized his laptop computer and four cell phones. 2RP 64, 84. DeFolo did not seize Padilla's router. 2RP 83.

In an interview the same day, Padilla admitted to having adult pornography on his computer, as well as images of young girls in bathing suits. 2RP 76. DeFolo testified Padilla "said that having those pictures [was] perverted, but he would never do anything to act on it." 2RP 76. Padilla explained to DeFolo that when he returned from Iraq in 2009, he withdrew from his friends, stopped dating, and began spending more time on the internet. 2RP 77.

Detective Joseph Klingman examined Padilla's laptop, cell phones, and his work computer. 2RP 93. Nothing was found on Padilla's phones or work computer. 2RP 84-85. However, Klingman testified he found hundreds of images of children performing sexual acts or posing nude in the unallocated space on Padilla's laptop. 2RP 133-34, 140-41. With a Windows operating system, deleted files are stored in unallocated space after emptying the recycle bin or clearing internet browsing history. 2RP 104-08. Files in unallocated space are automatically overwritten as the hard drive needs space. 2RP 104-05. The files are no longer accessible without forensic or data recovery software, which was not installed on Padilla's

computer. 2RP 104-05, 173-74; 3RP 309-10. Klingman agreed Padilla could not have accessed any of the illicit images. 2RP 173-74. Padilla did, however, have legal images of scantily clad young girls, as well as adult pornography, saved on his hard drive. 2RP 113-15, 228-29.

Klingman also testified he found evidence of several internet searches on Padilla's computer, such as "Preteen pics," "Child porn FrostWire," and "How to delete stuff from an unallocated space." 2RP 128-29. Klingman explained FrostWire is a peer-to-peer file sharing program, which Klingman believed Padilla used to download child pornography videos. 2RP 128, 156. As FrostWire files download, they are placed in an incomplete folder. 2RP 190-91. Klingman testified all but a few videos he found were in the incomplete folder, meaning Padilla may have only started downloading the files, then deleted them. 2RP 190-94. Klingman also explained he recovered several e-mail and Yahoo chat records in which a person named Brian Petes discussed his interest in juvenile girls. 2RP 130-32. Klingman believed Padilla used Brian Petes as an alias, given some similarities between the two men. 2RP 137-39.

Klingman acknowledged Padilla's case was unusual, because child pornography users tend to hoard it and keep it accessible so they can view it repeatedly. 2RP 171-72. The vast majority of the child pornography in the unallocated space on Padilla's computer was downloaded on only two

days—September 23, 2011 and August 5, 2012—almost a year apart, which Klingman also acknowledged "seems unusual." 2RP 195-96.

Klingman also believed the case was peculiar because he did not find any link files for the illicit images or videos. 2RP 183-88. Windows automatically creates a temporary link file whenever the user views an image or plays a video. 2RP 183-86. Klingman agreed the lack of link files could mean the images and videos were never actually viewed. 2RP 183-88.

Klingman explained there are several ways images could end up in unallocated space without ever being viewed. 2RP 238. For instance, an unopened e-mail attachment could be automatically downloaded to unallocated space depending on the user's e-mail settings. 2RP 182. Likewise, internet browsers cache all images on a visited website, as well as banners and pop-up windows. 2RP 225-26. The user would not actually see all these images if he did not scroll to the bottom of the webpage or immediately closed a pop-up window. 2RP 225-26; 3RP 314. Klingman acknowledged pornography pages often have numerous pop-up windows that would be cached. 2RP 226.

Computer forensic expert Larry Karstetter testified for the defense. 3RP 281-82. Karstetter explained FrostWire file names can be inaccurate—child pornography is often mislabeled as adult pornography. 3RP 300. Innocuous search terms such as "Britney Spears" will return child

pornography. 3RP 300-05. Because a FrostWire user can only see file names and not files previews, the user might download a particular file and then abort the download once he saw the offensive content. 3RP 301-05. This type of activity was consistent with the evidence regarding Padilla's FrostWire use. 3RP 301-05. Karstetter also believed the case was unusual because of the relatively small amount of child pornography found. 3RP 312-13. Like Klingman, Karstetter explained child pornography users typically amass thousands of images. 3RP 312-13.

The to-convict instruction for the first viewing count specified:

> To convict the defendant of the crime of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 1st day of January 2011 through the 12th day of September, 2012, in an internet session separate and distinct from that alleged in Counts II, III, and IV, the defendant intentionally viewed over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct;
>
> (2) That the viewing was initiated by the defendant; and
>
> (3) That the viewing of the visual or printed material occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 86. The remaining counts were charged similarly, with different definitions of sexually explicit conduct given for the first and second degree charges. CP 87-89 (to-convict instructions), 92-93 (definitions of sexually explicit conduct). Defense counsel did not object or take exception to the to-convict instructions. 3RP 345.

2. Appellate Proceedings

On appeal, Padilla argued the offense of viewing depictions of a minor engaged in sexually explicit conduct, like the similar possession offense, requires knowledge that the defendant know the person depicted was a minor. See Br. of Appellant, at 1. Otherwise, the offense could sweep in speech protected under the First Amendment. Br. of Appellant, at 18. Padilla accordingly argued the to-convict instructions and the charging document omitted this essential element of the offense, necessitating either reversal and remand for a new trial or dismissal without prejudice. Br. of Appellant, at 15-16, 20.

The court of appeals noted the viewing statute required the State to prove the defendant "(1) intentionally viewed visual or printed material over the internet; (2) that the material viewed depicted a minor engaged in sexually explicit conduct; and (3) that the viewing was initiated by the

defendant." Opinion, at 6. The court concluded that "[u]nder a plain reading of the statute's language, we cannot see how the statute impermissibly jeopardizes First Amendment protections." Opinion, at 7. The court accordingly affirmed Padilla's convictions, holding "Padilla has not shown that the statute is impermissibly overbroad." Opinion, at 7.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DECIDE WHETHER IT IS AN ESSENTIAL ELEMENT OF VIEWING DEPCTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT THAT THE DEFENDNANT KNEW THE PERSON DEPICTED WAS A MINOR.

The First Amendment prohibits an individual from being held criminally liable for possessing depictions of a minor engaged in sexually explicit conduct unless the individual knows the nature of the illegal material. The State must therefore prove beyond a reasonable doubt the accused had knowledge the person depicted was a minor. No Washington court has yet interpreted the statute criminalizing *viewing* depictions of a minor engaged in sexually explicit conduct. It follows, though, that to save the statute from overbreadth, knowledge is also an essential element of the viewing offense. The to-convict instructions and the charging document in Padilla's case omitted this essential element of the first and second degree offenses. This Court's review is therefore warranted under RAP 13.4(b)(3) to examine this significant question of constitutional law.

1. To-Convict Instruction

Essential elements of a crime are those the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). Due process requires that the jury instructions inform the jury the State bears the burden of proving each essential element of the crime beyond a reasonable doubt. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); State v. Garbaccio, 151 Wn. App. 716, 732, 214 P.3d 168 (2009). It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every element of the crime. Peters, 163 Wn. App. at 847.

In determining the essential elements of an offense, courts first look to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9.68A.075 defines first and second degree viewing depictions of a minor engaged in sexually explicit conduct as follows:

> (1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter 9A.20 RCW.
>
> (2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.

> (3) . . . The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.
>
> (4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

The statutory language does not require that the defendant knew the person depicted was a minor. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find nonstatutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005).

The legislature created the viewing offense in 2010. Laws of 2010, ch. 227, §§ 1, 7. Because it is a relatively new offense, there is no case law construing the statute. However, the legislature also criminalizes *possession* of depictions of a minor engaged in sexually explicit conduct. RCW 9.68A.070. Similar to the viewing statute, a person commits first degree possession when "he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e)." RCW 9.68A.070(1)(a).

The primary difference between the two offenses is possession requires knowledge while viewing requires intent. A person acts with intent or intentionally "when he or she acts with the objective or purpose to

accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a); CP 94. A person knows or acts with knowledge when:

> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
>
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). Intent is a more culpable mental state than knowledge. State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984). "When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally." RCW 9A.08.010(2).

The Washington Supreme Court has held the possession statute is not overbroad under the First Amendment because it includes scienter (i.e., knowledge) as an element of the offense. State v. Luther, 157 Wn.2d 63, 71, 134 P.3d 205 (2006). The legislature has specified it is not a defense to possession of child pornography "that the defendant did not know the age of the child depicted in the visual or printed matter." RCW 9.68A.110(3). In State v. Rosul, this Court considered whether, given this lack of defense, knowledge of the act of possession itself was sufficient to convict under the statute. 95 Wn. App. 175, 182, 974 P.2d 916 (1999).

The Rosul court explained "[a] natural grammatical reading of RCW 9.68A.070 would apply the scienter requirement to possession, but not to the

age of the children depicted." Id. If read in this manner, however, the statute might be facially overbroad because it would punish individuals engaged in otherwise innocent conduct, like possession of second-hand computer hardware or use of a digital camera containing illicit data files. Garbaccio, 151 Wn. App. at 733.

In New York v. Ferber, the U.S. Supreme Court cautioned that criminal liability for possession of child pornography "may not be imposed without some element of scienter on the part of the defendant." 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). But the Ferber Court did not specify the dimensions of this requisite scienter. Subsequently, however, the Court elected to impose a scienter requirement on every element of a federal statute that prohibits shipping and transporting child pornography—including the child's age. United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994).

Based on these cases, the Rosul court construed "RCW 9.68A.070 as requiring a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed." 95 Wn. App. at 185; see also Garbaccio, 151 Wn. App. at 734-35 ("[A]n individual may be convicted of possession of child pornography only if the State proves possession with knowledge of the nature of the content of the material in the defendant's possession."). Though the State need not prove specific

knowledge of the child's age, "the statute would be impermissibly overbroad" if "construed in a way that would not require prosecutors to prove that a defendant had this general knowledge." Rosul, 95 Wn. App. at 184-85.

The Washington Supreme Court Committee on Jury Instructions has since incorporated this knowledge element into the pattern to-convict jury instruction:

> To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date), the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;
>
> [(2) That the defendant knew the person depicted was a minor;] and
>
> [(3)] That this act occurred in the State of Washington.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 49A.04, at 918 (3d ed. 2008) (WPIC) (emphasis added). The comment to the instruction notes the bracketed language "may be used to require the State to prove that the defendant knew that the person being depicted was a minor," given the First Amendment issues discussed above. WPIC 49A.04 cmt. In Garbaccio, this Court approved of the above

instruction and held it "adequately instructed the jury as to the elements of the charged offense." 151 Wn. App. at 734.

Like the possession statute, the viewing statute must require a showing that the defendant knew the general nature of the material he or she viewed. The statute would otherwise be impermissibly overboard. The four to-convict instructions in Padilla's case omitted this essential element. CP 86-89. Instead, the instructions specified the State needed to prove only that (1) Padilla intentionally viewed the visual or printed matter over the internet, (2) Padilla initiated the viewing, and (3) the viewing occurred in Washington. CP 86-89. The to-convict instructions therefore relieved the State of its burden to prove all essential elements of the offenses beyond a reasonable doubt, violating Padilla's right to due process of law. Garbaccio, 151 Wn. App. at 732.

Under certain circumstances, omission of an essential element from the to-convict instruction may be subject to a harmless error analysis. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). Such an omission is harmless when it is clear beyond a reasonable doubt that it did not contribute to the verdict; for example, when "uncontroverted evidence" supports the omitted element. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the "error is not harmless when the evidence and

instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288.

This is not a case with overwhelming evidence. Both Klingman and Karstetter testified the case was unusual given the relatively small amount of child pornography found, all in unallocated space, inaccessible to Padilla. 2RP 171-72; 3RP 312-13. Klingman testified there were numerous ways a user could accidentally download child pornography to unallocated space. 2RP 182, 225-25, 238. The lack of link files found in unallocated space also suggested Padilla never viewed any of the contraband images or videos. 2RP 183-88. Karstetter further testified he could not rule out the possibility that Padilla's computer had been hacked or that nearby users accessed Padilla's network for illegal purposes. 3RP 286-94. This is the type of innocent possession for which a person cannot be held criminally liable under the First Amendment. Garbaccio, 151 Wn. App. at 733.

Padilla's knowledge that the individuals depicted were minors is not supported by uncontroverted evidence. As such, omission of the essential knowledge element from the to-convict instructions was not harmless beyond a reasonable doubt. This Court's should therefore grant review under RAP 13.4(b)(3), reverse the court of appeals, and remand for a new trial before a properly instructed jury. State v. Richie, 191 Wn. App. 916, 930, 365 P.3d 770 (2015).

2. Charging Document

Like a to-convict instruction, a charging document must include all essential elements of a crime, "statutory or otherwise." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of this rule is to notify the accused of the charges against him and allow him to prepare and present a defense. Id. at 101. An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. Kjorsvik, 117 Wn.2d at 102-03. When such is the case, as here, courts engage in a two-pronged inquiry: (1) do the necessary facts appear in any form or by fair construction can they be found in the charging document; and, if so, (2) can the individual show he was nonetheless actually prejudiced? Id. at 105-06. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). In such cases, this

Court presumes prejudice and reverses without further inquiry. McCarty, 140 Wn.2d at 425.

The charging document in Padilla's does not contain or imply all essential elements of the charged crimes. The two first degree offenses were charged as follows:

> That the defendant, on or about the 1st day of January, 2011, through on or about the 12th day of September, 2012, did intentionally view over the internet, in an internet session separate and distinct from that alleged in Counts III, IV, and V, visual or printed matter that depicted a minor engaged in actual or simulated sexual intercourse and penetration of the vagina or rectum by any object; proscribed by RCW 9.68A.075(1) and 9.68A.011(4)(a) and (b), a felony.

CP 104 (Count II). The two second degree offenses were charged similarly:

> That the defendant, on or about the 1st day of January, 2011, through on or about the 12th day of September, 2012, did intentionally view over the internet, in an internet session separate and distinct from that alleged in Counts II, III, and V, visual or printed matter that depicted the actual or simulated genitals and unclothed pubic and rectal areas of a minor and unclothed breast of a female minor, proscribed by RCW 9.68A.075(2) and 9.68A.011(4)(f), a felony.

CP 105 (Count IV); see also CP 122-23 (first amended information). This language omitted the essential, nonstatutory element that Padilla knew the individuals depicted were minors.

As discussed, case law establishes this is an essential element of viewing depictions of a minor engaged in sexually explicit conduct. The requisite knowledge that the persons depicted were minors cannot be found

or fairly implied from the charging language. Adult pornography is protected speech. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). As charged, the offense could sweep in innocent behavior, like intentionally viewing adult or "barely legal" pornography that actually depicted minors, unbeknownst to the viewer. This is precisely the reason the information must include the essential knowledge element. See Garbaccio, 151 Wn. App. at 733 (recognizing criminal liability does not attach for this type of innocent conduct).

This is where the court of appeals' reasoning is erroneous. The court acknowledged the elements of the statute require only (1) intentional viewing of material over the internet and (2) the material depicted a minor engaged in sexually explicit conduct. Opinion, at 6. And yet the court faulted Padilla for failing to "explain how the statute criminalizes innocent conduct when it only reaches individuals who initiate an Internet session intending to view material that depicts a minor engaged in explicit sexual conduct and who, then, in fact, view the very material sought." Opinion, at 7 (emphasis added). But the statute as written does not require the emphasized language. It requires only intentional viewing of material that happens to depict a minor. To save the statute from overbreadth, the defendant must also have knowledge that the person depicted is a minor. Nowhere do the to-

convict instructions require or charging document allege that Padilla had any such knowledge.

Kjorsvik provides a useful contrast. There, the court held an information must include all statutory and nonstatutory elements of the charged offense, because "mere recitation of the statutory language in the charging document may be inadequate." Kjorsvik, 117 Wn.2d at 98-99 (quoting State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The court explained it is sufficient to charge in language of the statute only if "the statute defines the offense with certainty." Id. at 99.

Kjorsvik**Error! Bookmark not defined.** was charged with first degree robbery. Id. at 95. Intent to steal is an essential element of robbery, even though the robbery statute does not include that element. Id. at 98. Though the precise "intent to steal" language was missing from Kjorsvik's information, id. at 96, the court explained it is not fatal to an information that the "exact words of a case law element are not used." Id. at 109. Rather, "the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged." Id.

The information alleged Kjorsvik "unlawfully, with force, and against the baker's will, took the money while armed with a deadly weapon." Id. at 110. The court reasoned it was "hard to perceive" how Kjorsvik could have taken all these actions "and yet not have intended to steal the money."

Id. Kjorsvik's intent to steal was therefore "necessarily implied" from the facts included in the information. Id. at 109. Reading the information as a whole and in a commonsense manner, then, the court held it informed Kjorsvik of all the essential elements of robbery. Id. at 110-11.

Here, the charging document largely parroted the language of the viewing statute. As demonstrated, though, the statutory language alone does not define the offense with sufficient certainty, because the State must also prove the individual knew the person depicted was a minor. But, unlike Kjorsvik, such knowledge cannot be necessarily implied from the facts alleged in the information. The information alleged only that Padilla intentionally viewed depictions of individuals engaged in sexually explicit conduct, who happened to be minors. It nowhere stated or implied he knew those individuals were minors.

A liberal reading of Padilla's information fails to reveal, by implication or otherwise, the essential element that he knew the individuals depicted were minors. Prejudice is presumed. McCarty, 140 Wn.2d at 425. This Court should therefore grant review under RAP 13.4(b)(3), reverse the court of appeals, and dismiss Padilla's convictions without prejudice.

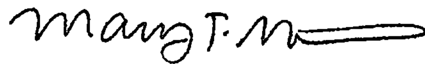
E. CONCLUSION

For the aforementioned reasons, Padilla respectfully asks this Court to grant review under RAP 13.4(b)(3).

DATED this 23rd day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74310-4-I
Respondent,	)	DIVISION ONE
v.	)	
JAMEEL L. PADILLA,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: April 24, 2017

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SPEARMAN, J. — Jameel Padilla was convicted of two counts of viewing depictions of a minor engaged in sexually explicit conduct in the first degree and two counts of the same offense in the second degree. On appeal, he contends that his convictions must be reversed because the charging document and the to convict jury instruction omitted an essential implied element of the charged crimes. Padilla also asserts that the community custody condition imposed by the trial court prohibiting him from frequenting places where minors congregate is unconstitutionally vague. We accept the State's concession of error as to the challenged community custody condition, but conclude that Padilla's remaining arguments are without merit. We remand to strike the unlawful condition, but otherwise affirm the judgment and sentence.

FACTS

In April 2012, a mother and father reported to the Arroya Grande Police Department that an unknown individual had sent sexually explicit messages to their nine-year-old daughter on Facebook. The detectives were informed that the individual used the profile name "Jim Wilcox." While the detectives were investigating the complaint, they discovered that the Internet Protocol Address for the computer used to access the Facebook account was associated with Jameel Padilla of Everett, Washington.

In September 2012, Everett Police executed a search warrant at Padilla's home. They seized a laptop computer from the home. A forensic examination of the computer revealed approximately one hundred sexually explicit photos of young girls in the unallocated space[1] in the computer's memory. It revealed videos of infants and children engaged in sexually explicit conduct. The examination also revealed internet search queries that Padilla initiated including: "child porn Frostwire;"[2] "What makes you a pedophile?;" "Eleven year old raped by 20 men;" "Little girl sucking;" and "How to delete stuff from an unallocated space." Verbatim Report of Proceedings (VRP) (09/22/15) at 128-29. Additionally, the examination revealed chat communications where the user was seeking content of children engaged in sexually explicit conduct.

[1] Data in unallocated space is data that has been deleted but continues to exist until it is overwritten.

[2] FrostWire is a peer-to-peer file sharing program.

Padilla was charged with two counts of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, and two counts of the same offense in the second degree.[3] The charging document alleged that Padilla intentionally viewed over the internet pictures of minors engaged in sexually explicit conduct.[4] The jury instructions for these counts mirrored this language.[5]

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[3] Padilla was also charged with one count of communication with a minor for immoral purposes via electronic communication which was severed from the other charges and tried separately.

[4] The charging document alleged as follows:

> That the defendant . . . did intentionally view over the internet, in an internet session . . . visual or printed matter that depicted a minor engaged in [sexually explicit conduct (first degree) or display of unclothed genitals or female breasts (second degree)] . . . .

Clerk's Papers (CP) at 104-05.

[5] The to convict instruction for the first viewing count explained that:

> To convict the defendant of the crime of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 1st day of January 2011 through the12th day of September, 2012, in an internet session separate and distinct from that alleged in Counts II, III, and IV, the defendant intentionally viewed over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct;
>
> (2) That the viewing was initiated by the defendant; and
>
> (3) That the viewing of the visual or printed material occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 86. The remaining counts were charged similarly, with different definitions of sexually explicit conduct given for the first and second degree charges.

The charging document did not specifically allege, nor did the jury instructions expressly require the State to prove, that Padilla knew he was viewing minors. Padilla did not object to the information or jury instructions on this, or any other, basis. The jury convicted him on all four counts.

The sentencing court imposed several conditions of community custody including prohibiting Padilla from frequenting areas where minor children are known to congregate. Padilla appeals.

DISCUSSION

Padilla makes three assignments of error on appeal. The first two concern whether we should read into the statute defining the crime of viewing depictions of a minor engaged in sexually explicit conduct (the viewing statute) an additional element of knowledge that the person depicted is a minor. Padilla claims that such knowledge is an essential element of the crime and that the charging document and the to-convict instructions given in this case were deficient because of its omission. Padilla's third claim challenges a community custody condition as unconstitutionally vague. We first decide whether Padilla is correct that a defendant's knowledge that the person viewed is a minor is an essential element of the charged crimes.

Padilla rests his argument in large part on our decision in State v. Rosul, 95 Wn. App. 175, 974 P.2d 916 (1999). In Rosul, we considered the statute criminalizing the possession of child pornography (the possession statute). The statute provided, in relevant part, that a person is guilty of possessing child pornography when that person "knowingly possesses visual or printed matter

depicting a minor engaged in sexually explicit conduct . . . ." Id. at 180; RCW 9.68A.070. We concluded the statute was impermissibly overbroad because, for example, a person delivering a package containing child pornography could knowingly possess the package and yet be unaware of its contents. Id. at 182. Thus, applying the statute as written, a person engaged in "clearly innocent conduct" could be in violation of it. Id. at 183. Accordingly, we construed the statute to require "a showing that the defendant was aware not only of possession, but also of the general nature of the material he or she possessed." Id. at 185.

Padilla argues that the possession statute and the viewing statute are similar and that, as with the possession statute, in order to save the viewing statute from being impermissibly overbroad, we must imply an element of knowledge that the person depicted was a minor. But, as we observed in Rosul, a statute is only impermissibly overbroad if it "will significantly compromise recognized First Amendment protections of persons not before the court." Id. at 182 (citing Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). To support his claim that the viewing statute is substantially overbroad, Padilla must "demonstrate from the text of [the challenged law] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988). He fails to carry this burden.

The viewing statute states, in relevant part:

> (1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree . . . .
>
> (2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree . . . .
>
> (3) . . . The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

RCW 9.68A.075.[6] Thus, in order to sustain a conviction, this statute requires the prosecution to prove that a defendant: (1) intentionally viewed visual or printed material over the internet; (2) that the material viewed depicted a minor engaged in sexually explicit conduct; and (3) that the viewing was initiated by the defendant.

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[6] Subsections (1) and (2) refer to RCW 9.68A.011(4) which reads as follows:

> (4) "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> (b) Penetration of the vagina or rectum by any object;
> (c) Masturbation;
> (d) Sadomasochistic abuse;
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
> (f) 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. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

Under a plain reading of the statute's language, we cannot see how the statute impermissibly jeopardizes First Amendment protections. Nor does Padilla explain how the statute criminalizes innocent conduct when it only reaches individuals who initiate an internet session intending to view material that depicts a minor engaged in explicit sexual conduct and who, then, in fact, view the very material sought. Unlike the possession statute, the viewing statute presents no identifiable risk of sweeping within its prohibitions innocent persons engaged in constitutionally protected activities.

We conclude that Padilla has not shown that the statute is impermissibly overbroad and reject his argument that we must imply an additional knowledge element to the viewing statute. And because his claims that the charging document and the to convict instructions are deficient hinge on the success of his overbreadth argument, they also fail. We affirm Padilla's convictions.

Padilla challenges the community custody condition prohibiting him from frequenting areas where minor children are known to congregate because it is unconstitutionally vague. The State concedes, and we agree, that the community custody condition is void for vagueness and should be stricken. In Irwin, we found that an identical prohibition was an unconstitutionally vague community custody condition. State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). We therefore remand to the sentencing court with instructions to strike the vague condition.

Padilla also asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2.

However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Here, Padilla was found indigent by the trial court. If the State has evidence indicating that Padilla's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Remanded to strike the unlawful condition but otherwise affirmed.

Spearman, J.

WE CONCUR:

Trickey, ACJ

Mann, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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