

93609-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERIC D. GRAY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

**STATE'S RESPONSE TO BRIEF OF AMICI CURIAE AMERICAN
CIVIL LIBERTIES UNION OF WASHINGTON, JUVENILE LAW
CENTER, COLUMBIA LEGAL SERVICES AND TEAMCHILD**

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I. STATEMENT OF THE CASE

Seventeen-year-old Eric Gray sent the victim, T.R., two text messages: one contained a picture of his erect penis, and the other said, “Do u like it babe? It’s for you ... And for Your daughter babe.” CP 59, 61. T.R. was 22 years old at the time of the incident and her daughter was a young minor; T.R. was also a former employee of the defendant’s mother. CP 59, 61, 65. The text messages were the culmination of a series of harassing and lewd telephone calls the defendant admittedly placed to T.R. CP 43-45. The State charged the defendant with second degree dealing in depictions of a minor engaged in sexually explicit conduct, and he was convicted of the charge after a stipulated facts trial. CP 1, 128. As a result of the conviction, the defendant was required to continue to register as a sex offender, as he was already required to do so pursuant to a previous adjudication for communication with a minor for immoral purposes (and had failed to satisfactorily comply his special sex offender disposition alternative on that charge). (2/28/14) RP 27-28, 32. Pursuant to the defendant’s conviction on the current charge, the State moved to dismiss one count of telephone harassment and two unrelated counts of indecent exposure. (2/28/14) RP 45; (1/28/14) RP 30; (11/14/13) RP 2-3.

II. ARGUMENT

A. THE LANGUAGE OF RCW 9.68A.050 IS UNAMBIGUOUS; THUS, RESORT TO ANY RULE OF STATUTORY CONSTRUCTION OR LEGISLATIVE HISTORY IS INAPPROPRIATE.

“The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). When a statute is unambiguous, “there is no room for judicial interpretation ... beyond the plain language of the statute.” *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000). The fact that two different interpretations are *conceivable* does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

Amici claim that the plain language of RCW 9.68A.050(2)(a) “does not permit prosecution for minors for taking pictures of themselves.” Br. of Amici ACLU of Washington et al (hereinafter “Br. of Amici”) at 3. Amici support this claim by the assertion that the term “a person” and “a minor” must be given different meanings by this Court, and call for this Court to resort to the fundamental rule of statutory construction that “the legislature is deemed to intend a different meaning when it uses different terms.” *Id.* at 3-4. However, Amici have failed to demonstrate (or even argue) that the plain language of the statute is ambiguous in any way, which would allow

this Court to resort to the use of the rules of statutory construction. Without a demonstrated ambiguity as a condition precedent, the Court does not engage in statutory construction at all, and instead, gives effect to the plain, unambiguous language of the statute. *See, e.g., State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Theilken*, 102 Wn.2d 271, 276, 684 P.2d 709 (1984).

“A minor” is defined by the statutory scheme as *any person* under eighteen years of age. RCW 9.68A.011(5) (emphasis added). Sexually explicit conduct, among other things, means “actual or simulated depiction of the genitals or unclothed pubic or rectal areas of *any minor* ... for the purpose of sexual stimulation of the viewer.” RCW 9.68A.011(4)(f) (emphasis added). “A person” includes any “natural person,” whether adult or minor. RCW 9A.04.110(17); RCW 9A.04.090 (making the definition in RCW 9A.04.110 applicable to offenses found in any title).

RCW 9.68A.050(2)(a) is unequivocal. It prohibits any person, whether adult or minor, from distributing sexually explicit photographs of any person under 18 years of age. RCW 9.68A.050(2)(a) does not state, for example, “*An adult* commits the crime of dealing in depictions of a minor ...” or, alternatively, “(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, *provided that the minor depicted and the person alleged to have committed the crime are different persons.*” Had the legislature intended to limit the application of RCW 9.68A.050(2)(a) in such a way, it certainly would have included such restrictive language in the statute.

Amici also assert “surely if the statute’s intent was to create felony liability for a minor taking or forwarding a depiction of him-or-herself, the statute would have been worded differently,” claiming that the legislature should have specifically indicated it was creating felony liability for minors who take or disseminate sexually explicit photographs of themselves. Br. of Amici at 4. To the contrary, the legislature *was clear* in its intent to create felony liability for *any person* who takes or disseminates such photographs by its use of the term “a person” which allows for the prosecution of any adult or minor natural person for the commission of the offense.

A clear example of how one state legislature has adopted specific provisions limiting criminal exposure of juveniles who take and distribute sexually explicit photographs reads:

No minor ... may intentionally create, produce, distribute, present, transmit, post, exchange, disseminate or possess, through any computer or digital media, any photograph or digitized image or any visual depiction of a minor in any conditions of nudity ... or involved in any prohibited sexual act... Any violation of this section constitutes the offense of juvenile sexting, which is a Class 1 misdemeanor.

S.D. Codified Laws § 26-10-33 (emphasis added).

Had our legislature wished to exempt certain individuals or certain conduct from the reach of RCW 9.68A.050, such as by wholly excluding minors from prosecution under the statute or the phenomenon of juvenile sexting, it could have expressly done so, as has been done by other state legislatures.¹ It has not done so. This Court should decline to accept Amici’s invitation to adopt an unsupported reading of the legislature’s clear and unambiguous statutory language.

As the State has repeatedly argued, it is inappropriate to resort to the legislative history of a statute to override the plain meaning of an otherwise unambiguous statute. *D.H.*, 102 Wn. App. at 627. Amici attempt to do just that. Amici cherry-pick² the portions of RCW 9.68A’s legislative history that suit their argument that the legislature intended to “separate the children to be protected by the statute ... and ‘those who pay to engage in the sexual abuse of children’ or ‘those who sexually exploit them.’” Br. of Amici at 5.

¹ Or, for that matter, as our legislature has already enacted with respect to lawful conduct between spouses. RCW 9.68A.005.

² Amici continue to accuse the Court of Appeals of “cherry-picking” research regarding teenage sexting in an effort to downplay the magnitude of the problem. Br. of Amici at 11; Br. of Amicus Curiae ACLU in Support of Pet. for Review at 6. The studies discussed by Amici are analyzed below.

If this Court reviews the legislative history behind RCW 9.68A, it should not only review the “cherry-picked” portions cited by Amici, but *all* indicators of the legislature’s intent.

In doing so, Amici neglect to address the other portions of the declared legislative intent which indicate the legislature also considered the importance of preventing repeated instances of viewing child pornography by “stamping out the vice” “at all levels in the distribution chain.” RCW 9.68A.001. The only way for the legislature to ensure that any minor whose pornographic photograph was unwillingly or even willingly taken is kept out of the stream of commerce is to treat such an image as “prima facie contraband” and outlaw its production and distribution entirely. RCW 9.68A.011(4).

Even if Mr. Gray does not consider himself victimized by his self-produced and distributed photograph, he could easily be victimized in the future, even repeatedly so, if that depiction were to land in the hands of an unscrupulous adult who was to disseminate the photograph beyond its originally intended recipient. Moreover, RCW 9.68A.050 does not require a specific, named victim; rather it requires only that the depiction is of an actual minor. RCW 9.68A.110(5). Given that the statute does not require a named victim, it is ultimately irrelevant whether Mr. Gray could or could not victimize himself by taking or disseminating such a photograph. The only inquiries that are relevant, under the statute as written, is whether Mr. Gray is “a person,” whether he “dealt in a sexual depiction” as defined in RCW 9.68A.050, and lastly, whether that depiction was of “a minor.”

The facts of this case demonstrate that the answer to each of those questions was “yes.” Under the unambiguous language of RCW 9.68A.050, Mr. Gray committed the offense of dealing in depictions of a minor engaged in sexually explicit conduct.

B. RCW 9.68A.050’S PROHIBITION ON THE PRODUCTION OR DISTRIBUTION OF SELF-PRODUCED CHILD PORNOGRAPHY DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT.

In their current brief supporting reversal of Mr. Gray’s conviction, Amici have provided no new argument or support for their contention that RCW 9.68A.050 prohibits a significant amount of constitutionally protected conduct or is unconstitutionally vague or overbroad. In fact, a significant portion of Amici’s current brief has been borrowed, verbatim, from Amici ACLU’s brief in support of Mr. Gray’s petition for review. Br. of Amici at 7-9; Br. of Amicus ACLU in Support of Review at 8-10.

As the State has previously argued, the distinguishing feature of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), is that no actual minor was depicted in any of the images at issue in that case. Here, however, an actual minor *was* depicted in the photograph, and Amici and Mr. Gray cannot seriously dispute that if the photograph had been disseminated by the original recipient, and received by hundreds, if not thousands, of other people, or had been posted

on thousands of Facebook or Snapchat pages, Mr. Gray could have suffered serious harm to his reputation and psyche.

The principle of constitutional avoidance need not be applied here, as suggested by Amici, because it remains constitutionally permissible under *Ashcroft v. Free Speech Coalition*, to prohibit the production and dissemination of pornographic photographs depicting actual minors. 535 U.S. at 240.

Amici argue that this case is not about whether minors have a superior right under the law to distribute pornographic photographs of themselves, as the State has previously argued and the Court of Appeals has determined. *State v. E.G.*, 194 Wn. App. at 464. Conversely, Amici contend that this case is about whether this Court should uphold a construction of this statute that “reaches beyond what the State and Federal Constitutions permit government to criminalize.” Br. of Amici at 8. But one cannot determine whether the statute overreaches without initially determining whether minors have the right to produce or circulate this material where an adult would not have the right to do so. If juveniles have no *superior* right to voluntarily take and distribute pornographic photographs of themselves, then the State and Federal Constitutions afford them no protection for that conduct; after all, the United States’ Supreme Court has declared that child pornography is a “category of material outside the protection of the First

Amendment.” *New York v. Ferber*, 458 U.S. 747, 760, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Amici have failed to make any demonstration of how a minor child has a greater right to distribute a pornographic depiction of him or herself than an adult or another minor would have.

Also if, as discussed above, one goal of the prohibition of the production and distribution of child pornography is to keep such depictions out of the stream of commerce, then the only effective way to achieve that goal is to prohibit *anyone* from developing or distributing child pornography, even if that depiction is self-produced. RCW 9.68A.001; *see also Ferber*, 458 U.S. at 760 (“The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product”).

Amici’s vagueness argument rests on its erroneous conclusion that the plain language of the statute “clearly distinguishes between the ‘minors’ it is intended to protect and ‘a person’ who develops, duplicates, etc. the sexually-explicit depictions of that minor.” Br. of Amici at 9. As discussed above, the language of the statute is clear that no person may distribute such a photograph of “any person under the age of 18,” without facing criminal consequences. RCW 9.68A.050 does not deal in terms that are susceptible to multiple meanings or unclear definitions. Each of its terms is defined

elsewhere in the statutory scheme, and is susceptible to only one reasonable interpretation. As the State has repeatedly argued, no person who reads the language of the statute would be left with any uncertainty that it is illegal for all persons to distribute pornographic photographs of any minor.

C. HARSH CONSEQUENCES THAT MAY RESULT FROM JUVENILE SEXTING SHOULD BE ADDRESSED TO THE LEGISLATURE, NOT TO THIS COURT.

As above, Amici’s current brief does not add any new arguments or law in support of its position, and, also as above, in many instances simply parrots the argument made by Amicus Curiae ACLU in its Memorandum in Support of Gray’s Petition for Review.³

The probative value of Amici’s citation to its claimed “knowledge” of other Washington State prosecutors’ offices’ charging practices is unknown. Amici assert, “and as has happened elsewhere in the state, the lower courts’ reading of the statute would even permit county prosecutors to charge the unwilling minor recipients of any such image with possession of child pornography.”⁴ Br. of Amici at 11. This is not the first time Amici

³ Br. of Amici at 11-12; Br. of Amicus Curiae ACLU in Support of Pet. for Review at 6-7.

⁴ It would likewise be outside the record for the State to assert that T.R., the recipient of Mr. Gray’s pornographic text, was *not* charged with possession of child pornography, even though she, too, was an unwilling recipient of Mr. Gray’s *prima facie* contraband.

have asked this Court to consider facts outside the record.⁵ The State objects to Amici's flagrant use of unsubstantiated "information," rumor, or speculation that is outside of the record before this Court, especially where, as here, Amici fail to cite their source, or provide *any* means for the State or this Court to verify their assertions. These unsubstantiated claims should not be considered by this Court.

The State reiterates that any potentially harsh results of punishing teenage sexting as a sex offense must be addressed to the legislature, as this Court does not question the wisdom of legislative enactments. *See United States v. Fletcher*, 634 F.3d 395, 403 (7th Cir. 2011); *Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997); *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992). Our legislature, unlike other State legislatures, has not revised RCW 9.68A or passed (or even proposed) any new legislation which would exempt teenage sexting from the ambit of the statute or reduce penalties or collateral consequences, such as sex offender registration,⁶ for juvenile offenders.

⁵ See Br. of Amicus Curiae ACLU in Support of Pet. for Review at 5; State's Answer to Br. of Amicus Curiae's Mem. In Supp. of Rev. at 10 n.6.

⁶ Sex offender registration is not considered punishment, but rather a regulatory consequence incident to conviction. *State v. Ward*, 123 Wn.2d 488, 510-511, 869 P.2d 1062 (1994).

D. AMICI'S CITED STUDIES DEMONSTRATE THAT JUVENILE SEXTING IS GENERALLY NOT CRIMINALLY CHARGED BY PROSECUTORS AND GENERALLY DOES NOT RESULT IN SEX OFFENDER REGISTRATION ABSENT AGGRAVATING CIRCUMSTANCES.

As indicated above, Amici are concerned that the Court of Appeals used “an outlier study” to downplay the magnitude of the teenage sexting problem. However, a thorough review of Amici’s proffered studies reveals that law enforcement and prosecutors alike generally use sound discretion in charging cases involving youth-produced depictions of minors involved in sexual conduct.

For instance, Amici cite a 2012 study of law enforcement agencies nationwide for the proposition that the potential harsh legal penalties associated with juvenile child pornography convictions is “not an abstract risk.” Br. of Amici at 12, citing Janis Wolak, J.D., David Finkelhor, Ph.D, and Kimberly J. Mitchell, Ph.D, *How Often are Teens Arrested for Sexting? Data from a National Sample of Police Cases*, PEDIATRICS 129:4-12 (2012) (available at <http://pediatrics.aappublications.org/content/129/1/4.full-text.pdf>). Amici do not disclose, however, that this study also indicates that law enforcement tends to treat adult-involved cases (i.e., those where an adult was either the recipient or the solicitor of images) and “youth-only aggravated” cases (i.e., those cases where only minors were involved, but the sexting was nonconsensual, malicious, or exploitative)

very differently from what the authors call “experimental” youth-only cases (cases involving youth in romantic relationships, sexual attention seeking, or sexual curiosity.) Wolak, *supra*, at 6-7. Arrests occurred in 62% of the adult-involved cases and in only 39% of the youth-only aggravated cases. *Id.* at 7. Five percent of the “youth-only aggravated” offenders were subject to sex offender registration, and of these individuals, seven had also sexually assaulted and photographed their victims, and two used the internet to entice victims to send them images. *Id.* The study determined that:

The only juvenile offender subject to sex offender registration who did not commit crimes beyond the creation and distribution of sexual images was a 14-year-old boy who sent a picture of his penis to a schoolmate. He had an extensive criminal history, including a burglary conviction.

Id. (emphasis added).

This particular study also acknowledged that it did not speak to the frequency of sexting among the youth population, because “the vast majority of incidents likely never come to police attention.” *Id.* The study did conclude, however, that the “diversity of cases ... clearly undermines some reports that suggest that sexting is relatively harmless or confined to dating behavior. Only 10% of [reported] cases involved images created for or sent to established adolescent girlfriends or boyfriends.” *Id.* at 8. With regard to the experimental youth-only cases, only seven juveniles’ cases

resulted in a felony plea or conviction, but none of those individuals were required to register as sex offenders.⁷ *Id.* at 8 (Table 1).

Amici also cite to a survey of prosecutors' offices for the proposition that, of the 378 state prosecutors interviewed, "a majority of them had handled a sexting case involving juveniles, with 21 percent of the sample having brought felony charges, and 16 percent having brought charges that would have required the minor to register as a sex offender." Br. of Amici at 13. This study also reveals general trends in why those prosecutors made certain charging decisions and how those cases were ultimately resolved.

Most prosecutors had sexting cases resolved by plea agreement (71%) or juvenile court (69%). Half of prosecutors (50%) mentioned diversion, 26% said dismissal of charges, and 4% said by a criminal trial.

Wendy Walsh, Janis Wolak and David Finkelhor, *Sexting: When are State Prosecutors Deciding to Prosecute? The Third National Juvenile Online Victimization Study*, CRIMES AGAINST CHILDREN RESEARCH CENTER (2013) (available at [http://www.unh.edu/ccrc/pdf/CV294Walsh_Sexting%20&%20prosecution 2-6-13. pdf](http://www.unh.edu/ccrc/pdf/CV294Walsh_Sexting%20&%20prosecution%202-6-13.pdf)).

Prosecutors involved in the study indicate their charging decision was affected by a number of factors going beyond the typical "boyfriend/girlfriend" sexting situation. *Id.* These factors included cases involving: malicious intent, bullying, coercion, or harassment (36%),

⁷ Of the 214 "experimental youth-only" cases, 47 individuals were arrested, but only seven cases resulted in a felony conviction.

distribution of the photographs where the juvenile had previously been the subject of a prior non-criminal intervention, or the distribution occurred without consent of the subject (25%), large age difference existing between the involved parties (22%), or extremely graphic images – such as those portraying violence, gang rape, or extremely explicit pictures (9%). *Id.* The study also indicates that its figures were gleaned by a “convenience sample” which was not representative of how often prosecutors nationwide handle sexting cases. *Id.* Neither of these studies was specific to Washington State, or even indicates whether law enforcement officers or Washington prosecutors participated.

Amici also cite Melissa R. Lonrang, M.D., Dale E. McNiel, Ph.D, and Renee L. Binder, M.D., *Minors and Sexting: Legal Implications*, J. AM. ACAD. PSYCHIATRY LAW 44:73-81 (2016) (available at <http://jaapl.org/content/jaapl/44/1/73.full.pdf>) for the proposition that the number of minor sexting prosecutions that have resulted in convictions and appeals has “been growing rapidly”⁸ but that “[m]any states agree that there is or should be a difference between statutes enacted to prosecute

⁸ This conclusion does not address whether the growth in the number of sexting incidents that has resulted in prosecution, conviction or appeal is resultant from the number of juveniles who have access to cellular telephones or are participating in this conduct, or whether it is due to an increased number of “adult involved” or “aggravated youth-only” cases that are brought to law enforcement’s attention.

individuals for the creation and dissemination of child pornography and statutes used to punish or deter minors from sending sexually explicit photographs to other minors.” Br. of Amici at 13. This article also reiterates that prosecutors generally do not charge juvenile sexting cases unless the incident involved exacerbating circumstances. Lonrang, *supra* at 74.

The State does not dispute that many states agree that there is or should be a difference between “experimental” sexting (as defined by the University of New Hampshire researchers published in *Pediatrics*, above) and other types of distribution of sexually explicit images of minors. However, as discussed above, our state legislature has not yet affirmatively expressed its agreement with that premise by providing an exception to RCW 9.68A.050 that either decriminalizes youth sexting or addresses it in some other fashion.

Ultimately, this Court should not lose sight of the facts of this case amidst the collateral discussion presented by Amici of the risk of conviction faced by the “thousands of minors within the state engaging in a *common teenage practice* plainly abetted by 21st century technology.” Br. of Amici at 14 (emphasis added). Mr. Gray was not involved in “experimental” sexting. He was not “curious.” He was not in a romantic relationship with the recipient of his text messages. He was not “seeking attention” from his peers. He did not distribute this photograph as a result of peer pressure. He

was not subject to sex offender requirements based solely on consensual conduct between peers. He was not “engaging in a common teenage practice.”

Conversely, Mr. Gray was already a convicted sex offender. He had been involved in court ordered sex offender treatment pursuant to his earlier conviction for communication with a minor for immoral purposes. Clearly, based on the current charge, as well as the two unrelated counts of indecent exposure the defendant faced for exposing his genitals on a school bus, he had failed to progress in his sex offender treatment.

Mr. Gray was charged with dealing in depictions of a minor engaged in sexually explicit conduct (and the dismissed charge of telephone harassment) as a result of his ongoing, lewd harassment of a woman, only five years his senior, and her young daughter, neither of which had any significant relationship with the defendant, other than being acquainted with his mother. The defendant repeatedly called the woman at night, over the course of a year, breathing heavily, and asking questions of a sexual nature. The pinnacle of this pattern of harassment was the photograph of his engorged penis with the attendant message, “Do u like it babe? It’s for you ... And for Your daughter babe.” It is the defendant’s repeated criminal sexual conduct that resulted in the current charge and associated sex offender registration requirement, rather than the application of a criminal

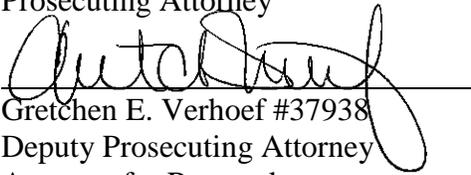
statute that was used to penalize innocuous or common teenage sexual exploration.

III. CONCLUSION

The State respectfully requests that this Court hold that RCW 9.68A.050 is clear and unambiguous, and the application of that statute to Mr. Gray's conduct does not violate the First or Fourteenth Amendments.

Dated this 2 day of May, 2017.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC GRAY,

Appellant.

NO. 93609-9

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 2, 2017, I e-mailed a copy of the State's Response to Brief of Amici Curiae American Civil Liberties Union of Washington, Juvenile Law Center, Columbia Legal Services and TeamChild In this matter, pursuant to the parties' agreement, to:

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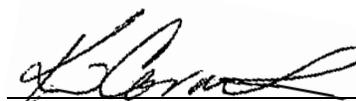
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