

NO. 43585-3-II

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

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STATE OF WASHINGTON,

Respondent/Cross Appellant,

v.

STEVEN POWELL,  
Appellant/Cross Respondent.

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

The Honorable Ronald E. Culpepper, Judge

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RESPONSE BRIEF OF APPELLANT/CROSS RESPONDENT

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A. ARGUMENT IN RESPONSE TO CROSS APPEAL

THE COURT CORRECTLY DISMISSED COUNT XV BECAUSE THE PROFFERED EVIDENCE FAILED TO SHOW THE PHOTOGRAPHS DEPICTED A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

Mr. Powell was charged in Count XV with violating RCW 9.68A.070(2). CP 1. Under that statute, “[a] person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).” RCW 9.68A.011(4)(f) defines sexually explicit conduct in part as “[d]epiction 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.”

Under former RCW 9.68.011 sexually explicit conduct was defined as “Exhibition 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.” Former RCW 9.68A.011(3)(e) (Laws of 1984, ch. 32 § 1 (eff. July 23, 1984)). The legislature amended RCW 9.68A.011 in 2010. Part of the 2010 amendment substituted the word “exhibition” in RCW 9.68A.011(3)(e) for the word “depiction” and

renumbered it as current RCW 9.68A.011(4)(f). Laws of 2010. ch. 227 § 3 (eff. June 10, 2010).

On more than one occasion this Court has interpreted the language in former RCW 9.68A.011(3)(e). In State v. Grannis, 84 Wn. App. 546, 930 P.2d 327 (1997), Grannis was charged with violating RCW 9.68A.070. Grannis secretly photographed minor girls on a playground and taking a bath. Because the minors were photographed doing normal activity, and there was no evidence that the defendant initiated, contributed to, or in any way influenced the girls' conduct, this Court found that the evidence did not establish the girls were engaged in “sexually explicit conduct” within the meaning of RCW 9.68A.011(3)(e). This Court held the language, “for the purpose of sexual stimulation of the viewer” means “the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence.” Grannis, 84 Wn. App. at 549-50.

In State v. Whipple, 144 Wn. App. 654, 183 P.3d 1105 (2008), this Court again found the evidence did not establish “sexually explicit conduct” within the meaning of RCW 9.68A.011(3)(e). Whipple photographed his minor stepdaughter undressing, and naked, from outside her bedroom window. Neither Whipple nor any other person contributed, initiated, caused or influenced his stepdaughter to engage in the conduct.

Id. at 661. Relying on its decision in Grannis, and the Washington State Supreme Court's decision in State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997)<sup>1</sup>, this Court held there was insufficient evidence to support Whipple's convictions of possessing depictions of a minor engaged in sexually explicit conduct.

The State argues the holdings in Grannis and Whipple are inapplicable to RCW 9.68.011(4)(f) because "depiction" was substituted for "exhibition." Brief of Respondent (BOR) at 21. In support of its argument the State cites the dictionary definitions of "exhibition" and "depiction." Exhibition is defined as "showing." Id. Depiction is defined as "representation." Id. The State contends "exhibition" requires action on the part of the person photographed whereas "depiction" does not. It concludes the legislature therefore intended to change the definition of "sexually explicit conduct" to include photographs depicting naked minors taken without their knowledge while conducting normal activities if the depiction is for the possessor's own sexual stimulation. BOR at 21-22.

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<sup>1</sup> Chester secretly photographed his minor stepdaughter as she exited the shower and dressed herself. Chester, 133 Wn.2d at 17-18. Chester did not influence, alter, or affect her conduct in any way. Id. at 20. Chester was charged with sexually exploiting a minor under RCW 9.68A.040, which also required proof that a minor engaged in sexually explicit conduct. Id. The Supreme Court held that the legislature did not intend "to criminalize the photographing of a child, where there is no influence by the defendant which results in the child's sexually explicit conduct." Id.

The State made the same argument below. RP 14-19 (5/7/2012). The trial court rejected the argument. It found the substitution of the word “depiction” for “exhibition” did not change the meaning of “sexually explicit conduct” as interpreted in Grannis and Whipple. RP 67-69 (5/8/2012). The court was correct.

In interpreting former RCW 9.68A.011(3)(e), this Court reasoned:

By itself, an exhibition is inanimate and without any purpose of its own. Necessarily, then, its purpose is the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence. The initiator or contributor need not be the accused or the minor whose conduct is at issue. Whoever the initiator or contributor is, however, his or her purpose must be to sexually stimulate a viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of RCW 9.68A.011(3)(e).

Grannis, 84 Wn. App. at 549-550.

Depiction is likewise inanimate and without any purpose of its own. Its purpose is also the purpose of the person who initiates it. The legislature did not change the remaining words in the sentence defining “sexually explicit conduct” in former RCW 9.68A.011(3)(e). The initiator of the “depiction, just as the “exhibition, must do so to sexually stimulate the viewer.”<sup>2</sup> As in Grannis and Whipple, the conduct Mr. Powell

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<sup>2</sup> A single word in a statute should not be read in isolation, and “the meaning of words may be indicated or controlled by those with which they are associated.” State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) (quoting Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 87–88, 221 P.2d 832 (1950)).

photographed was normal activity and not for the purpose of sexual stimulation of the viewer.

Moreover, the legislature's stated intent for the 2010 amendment to RCW 9.68A.011 was to include viewing and dealing with child pornography via the internet, and to clarify the unit of prosecution between first degree and second degree offenses in response to the holding in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). Laws of 2010, ch. 227 § 1 (eff. June 10, 2010). There is no indication the legislature intended to change the requirement that a person must initiate the conduct depicted in the photograph or other visual representation for the purpose of sexually stimulating the viewer. See, Bob Pearson Constr., Inc. v. First Cmty. Bank of Wash., 111 Wn. App. 174, 179, 43 P.3d 1261 (2002) ("The legislature is presumed to know the case law construing statutes and to act consistently with such law unless it clearly intends otherwise."). The other amendments to Title 9.68A likewise add the word depiction in a number of provisions, including RCW 9.68A.070. Laws of 2010, ch. 227 § 4 (RCW 9.68A.050), § 5 (RCW 9.68A.060), § 6 (RCW 9.68A.070) (eff. June 10, 2010). It is more likely the word change was made to make the definition of sexually explicit conduct consistent throughout Title 9.68A, and the intent to include electronic representations.

To further bolster its argument the State cites this Court’s language in Grannis that “[n]othing said herein means that the legislature could or could not criminalize conduct of the sort at issues in this case.” BOR at 20 (citing Grannis, 84 Wn. App. at 551-552) (the conduct in Grannis was same as here, secretly photographing naked minors who were engaging in normal activity). The State contends that is what the legislature did when it substituted “depiction” for “exhibition.” Id. The State is partially correct. The legislature did criminalize that conduct but not in its 2010 amendment to RCW 9.68A.011. Instead, it criminalized that conduct in 1998, following the ruling in Grannis, by enacting the voyeurism statute. RCW 9A.44.115 (Laws of 1998, ch. 221 § 1 (eff. June 11, 1998)). See, Chester, 133 Wn.2d at 20 n. 3 (noting that Substitute House Bill 1441, which was codified as RCW 9A.44.115, was introduced in response to the Grannis decision).

Essentially the State opines that by substituting “depiction” for “exhibition,” the legislature intended to broaden the definition of “sexually explicit conduct” to encompass visual material that depicts “the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor,” regardless of the purpose of the depiction if the person possesses the depiction for his or her own sexual stimulation. BOR at 22. Under the State’s interpretation the language “for the purpose of sexual

stimulation of the viewer” is read out of the statute. See, Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996) (statutes must be interpreted and construed so no language is rendered meaningless or superfluous). Such an interpretation would also unconstitutionally criminalize a person’s lewd, prurient or lustful thoughts because the possession of any depiction of a naked child, regardless of how innocent, would violate the statute if the person possessing the depiction used, uses or intends to use the depiction for his or her own sexual stimulation.<sup>3</sup> See, Stanley v. Georgia, 394 U.S. 557, 566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (the government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts).

Putting aside the potential constitutional problems, if the legislature intended to criminalize the possession of any visual or printed matter depicting “the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor,” used or intended to be used by the possessor for his or her own sexual stimulation, it would have said so. It did not. It did not change the salient language that the “purpose” of the depiction must be for the “sexual stimulation of the

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<sup>3</sup> As the trial court noted, the State’s interpretation potentially criminalizes any possession of a visual depiction of an unclothed minor. RP 69 (5/8/2012).

viewer.” The difference between “exhibition” and “depiction” in the context of the statute is one of semantics.

The trial court correctly recognized the conduct alleged in Count XV was classic voyeurism, and “not depictions of minors engaged in sexually explicit conduct...” RP 69 (5/8/2012). The court properly granted the motion to dismiss Count XV.

B. CONCLUSION

For the above reasons this Court should affirm the trial court’s order dismissing Count XV.

DATED this 6 day of July, 2013.

Respectfully Submitted,

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	)	
STEVEN POWELL,	)	
	)	
Appellant/Cross Respondent.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE RESPONSE BRIEF OF APPELLANT/CROSS RESPONDENT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN POWELL  
DOC NO. 357992  
MONROE CORRECTIONS CENTER  
P.O. BOX 888  
MONROE, WA 98272-0888

SIGNED IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF JULY, 2013.

x Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

July 15, 2013 - 1:55 PM

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Response Brief of Appellant/Cross Respondent

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