[Cite as *In re J.P.*, 2012-Ohio-1451.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF: J.P., DELINQUENT CHILD.	**:**	**O P I N I O N**
	:	**CASE NO. 2011-G-3023**

Criminal Appeal from the Court of Common Pleas, Juvenile Division, Case No. 11 JD 098.

Judgment: Affirmed.

Christine M. Tibaldi and *Matthew C. Bangerter*, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant, J.P.).

David P. Joyce, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecuting Attorney, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee, the state of Ohio).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, J.P., appeals from the judgment of the Geauga County Court of Common Pleas, Juvenile Division, denying her motion to dismiss on one count of disseminating matter harmful to juveniles. For the reasons that follow, the judgment is affirmed.

{¶2} On March 7, 2011, a complaint was brought against appellant, aged 13, charging her with disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(1), a first-degree misdemeanor if committed by an adult. The complaint stated that appellant sent nude photographs of herself to a juvenile male. The record

does not indicate the age of the juvenile male. According to appellant, the images were taken and transmitted via cellular telephone with a built-in camera. The record does not indicate what portion of the anatomy was specifically depicted or in what manner.

{¶3} Thereafter, appellant filed a motion to dismiss, which was denied. Appellant then entered a no-contest plea, and the trial court found the allegation of delinquent conduct to be true. She was sentenced to one to 30 days in detention, which was suspended. She was ordered to complete 16 parental-supervised hours of community service, complete an educational program on "sexting" at Ravenwood Mental Health Center, and write an essay. She was also banned from using a cellular telephone for six months.

{¶4} Appellant now appeals with a record limited in scope. Although appellant stated at the onset of the appeal that a statement of the record would be prepared in lieu of a transcript, no such statement was ever filed with this court. Appellant asserts the following assignment of error:

{¶5} "The trial court erred to the prejudice of the defendant-appellant by denying her motion to dismiss."

{¶6} A trial court's judgment on a motion to dismiss is reviewed under a de novo standard. *State v. Rode*, 11th Dist. No. 2010-P-0015, 2011-Ohio-2455, ¶14, citing *State v. Wendel*, 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, *5 (Dec. 23, 1999).

{¶7} Here, appellant was charged under R.C. 2907.31(A)(1), which states:

{¶8} (A) No person, with knowledge of its character or content, shall recklessly do any of the following:

{¶9} (1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles[.]"

{¶10} Appellant was found delinquent of an offense that, if committed by an adult, would be a first-degree misdemeanor, as the material sent was considered "harmful." If it had been considered "obscene" material, the offense would be a fourth-degree felony charge. R.C. 2907.31(F).

{¶11} R.C. 2907.01(E) supplies the relevant definition of "harmful to juveniles":

{¶12} (E) 'Harmful to juveniles' means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

{¶13} (1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

{¶14} (2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

{¶15} (3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

{¶16} The subject statute goes on to enumerate several affirmative defenses, though notably absent is a defense involving the *age* of the defendant:

{¶17} (B) The following are affirmative defenses to a charge under this section that involves material or a performance that is harmful to juveniles but not obscene:

{¶18} (1) The defendant is the parent, guardian, or spouse of the juvenile involved.

{¶19} (2) The juvenile involved, at the time of the conduct in question, was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

{¶20} (3) The juvenile exhibited to the defendant or to the defendant's agent or employee a draft card, driver's license, birth record, marriage license, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or over or married, and the person to whom that document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under the age of eighteen and unmarried.

{¶21} (C)(1) It is an affirmative defense to a charge under this section, involving material or a performance that is obscene or harmful to juveniles, that the material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person."

{¶22} The Committee Notes do not shed any light on this set of circumstances. Since the statute's last amendment in 2004, technological advancements have paved the way for cellular telephones with high-quality, built-in cameras, enabling users to take pictures and immediately send them from the device to other phones or computers via e-mail, text/image message, or web. This technology has contributed to the recent phenomenon of "sexting," a term found in the court's judgment entry, meaning the practice of sending nude or sexually suggestive digital photographs via text/image message. It is quickly becoming a matter of increasing concern, as courts have noted that "the practice is widespread among American teenagers[.]" *Miller v. Skumanick*, 605 F.Supp.2d 634, 637 (2009). We recognize that neither the subject statute nor any other enactment of the Ohio Revised Code reflects this emerging issue.[1]

{¶23} As a preliminary matter, we note R.C. 2907.31 enjoys a strong presumption of constitutionality, as do all lawfully-enacted statutes. *State v. Morris*, 11th Dist. No. 2008-Ohio-0110, 2009-Ohio-6033, ¶82. As such, before a court may declare a statute unconstitutional, the legislative and constitutional provisions must be clearly incompatible beyond a reasonable doubt. *Id*. "A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set

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1. **{¶a}** Legislation which addresses this issue is currently pending in Ohio. S.B. No. 103 / H.B. No. 132 provides the proposal:

{¶b} That section 2907.324 of the Revised Code be enacted to read as follows:

{¶c} (A) No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.

{¶d} (B) It is no defense to a charge under this section that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material that shows themselves in a state of nudity.

{¶e} (C) Whoever violates this section is guilty of illegal use of a telecommunications device involving a minor in a state of nudity, a delinquent act that would be a misdemeanor of the first degree if it could be committed as an adult.

{¶f} The legislative notes expressly state that the proposed statute does not foreclose on the possibility of bringing other criminal charges available to the prosecuting body, including R.C. 2907.31.

of facts." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶17. In an as-applied scenario, the challenger bears the burden to demonstrate that the statute, though constitutional in some applications, is unconstitutional as applied to the context in which he or she acted. *Id*.

{¶24} Here, appellant argues that the application of the statute as applied to juveniles violates the Due Process and Equal Protection clauses of the United States and Ohio Constitutions. Specifically, appellant argues the statute is unconstitutionally vague because it fails to provide guidelines designating which party is the victim and which party is the offender. She argues that this results in an arbitrary and discriminatory enforcement of the law as applied to juveniles because it criminalizes consensual conduct between two members of the statute's protected class, producing an absurd result.

{¶25} The vagueness doctrine is a component of due process which encompasses two fundamental safeguards. The first safeguard is the basic concept of notice—that an individual of ordinary intelligence can understand what the law requires of them. *Kruppa v. City of Warren*, 11th Dist. No. 2009-T-0017, 2009-Ohio-4927, ¶11, citing *State v. Williams*, 88 Ohio St.3d 513, 532 (2000) and *State v. Anderson*, 57 Ohio St.3d 168, 171 (1991). The second safeguard is the assurance that the legislation is written in a fashion which provides "sufficient standards to prevent arbitrary and discriminatory enforcement." *Id*., citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999).

{¶26} The United States Supreme Court recognizes the second safeguard as the more important aspect of the vagueness doctrine:

> **{¶27}** Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized * * * that the more

> important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' * * * Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep (that) allows policemen, prosecutors, and juries to pursue their personal predilections.' *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), quoting *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974).

{¶28} The Ohio Supreme Court recently echoed the importance of this second safeguard:

> **{¶29}** This prong of the vagueness doctrine not only upholds due process, but also serves to protect the separation of powers: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.' *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, quoting *United States v. Reese*, 92 U.S. 214, 221 (1876).

{¶30} Appellant argues this second safeguard has been offended. We find, however, that the statute provides guidelines to law enforcement such that governance will not result in arbitrary and discriminatory enforcement. The statute is quite clear as to what constitutes prohibited conduct and who constitutes an offender. It does not make a distinction between adult offenders and juvenile offenders. Instead, the statute

holds the offending *person* strictly liable for their action, regardless of age. The only relevant inquiry pertaining to age is that of the victim. Appellant does not fit the definition of both victim and offender, as she argues. In fact, such a classification is hardly necessary. Simply put, the legislature has proscribed a certain kind of act to be unlawful. Any person who engages in the unlawful act can be charged under the statute.

{¶31} Additionally, though appellant draws attention to the conduct being consensual, the statute does not distinguish between consensual and non-consensual "sexting". Indeed, such a distinction is not necessary, especially as "harmful to juveniles" is analyzed under an objective standard. When an image is sent between two consenting teenagers, such digital exhibitionism can reach far past its intended recipient. As the image of the nude juvenile enters the boundless realm of cyberspace, it can be duplicated and sent instantaneously with incredible ease by anyone with even the most primitive computer or cellular-phone knowledge. No further validation is needed to justify the need for a statute criminalizing this behavior. Though it takes a split second of impetuous fortitude to click the "send" button, there is no limit to where the image can spread and how long it can be retained.

{¶32} Additionally, this statute has been applied to a juvenile by this court in the past, albeit in a complicity context. In *In re S.J.F.*, 11th Dist. No. 2010-G-2960, 2010-Ohio-5514, a juvenile male solicited a nude photograph from a juvenile female and was charged with complicity to disseminating material harmful to a juvenile. *Id*. at ¶2. This court did not discuss the constitutionality of the statute as applied to a juvenile, but upheld the conviction under both sufficiency and manifest weight assignments of error. *Id*. at ¶9-10. We concluded: "Although appellant contends that a topless photograph is

not harmful to juveniles, it was not against the manifest weight of the evidence for the trial court to determine that this photograph was harmful." *Id*. at ¶27. There, just as here, the juvenile's conduct was that which was prohibited by the statute.

{¶33} Appellant argues her case is on point with *In re D.B*., 129 Ohio St.3d 104, 2011-Ohio-2671. There, D.B., aged 12, was adjudicated delinquent on charges of rape, in violation of R.C. 2907.02(A)(1)(b), after the juvenile court found that he had engaged in consensual sexual conduct with an 11-year-old boy. *Id*. at ¶8. This subsection of the statute criminalizes what is known as "statutory rape," holding the offender *strictly liable* for any sexual conduct with persons under the age of 13. *Id*. at ¶13. The court concluded that this particular subsection of the statute, as applied to children under 13 who both consent to the conduct, is unconstitutionally vague because enforcement in such a scenario results in an arbitrary and discriminatory enforcement: "[W]hen two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down." *Id*. at ¶24-25. The court pointed out that a child under 13 could, however, be found "guilty" (actually, "delinquent") of other subsections of the statute without any constitutional violation. *Id*. at ¶28.

{¶34} Appellant's reliance on *In re D.B.* is misplaced. As stated above, appellant is not both a "victim" and "offender" as claimed. The statute requires only *one* person to act in order to be culpable. In *In re D.B.*, two people engaged in the proscribed conduct, but only one was charged. Here, only appellant engaged in the unlawful act. Further, had appellant sent *any* nude photograph to a juvenile, e.g., a nude photograph of an adult, she would still have disseminated harmful material. Simply because the image was of her does not make her any less culpable of the offense. In this case, appellant

recklessly disseminated harmful material. That is, since the facts alleged in the complaint were found to be true, only appellant is in violation of the statute; whereas, in *In re D.B*., "if the facts alleged in the complaint were true, D.B. and M.G. would both be in violation of R.C. 2907.02(A)(1)(b)." *Id*. at ¶24-25.

{¶35} Thus, we cannot conclude that the statute, as applied to juveniles, is unconstitutionally vague. Enforcement of the statute does not result in an arbitrary or discriminatory enforcement. Instead, it provides clear guidelines on precisely the type of activity that is unlawful.

{¶36} Appellant additionally raises several ancillary arguments throughout her brief which will be addressed in a consolidated fashion.

{¶37} First, appellant argues that the application of the statute in these circumstances violates fundamental fairness under due process. Specifically, appellant argues that holding juveniles to the same level of culpability as adults under the statute violates fundamental fairness since juveniles engage in "sensation-seeking, present-oriented thinking." Appellant also questions how criminal liability will serve to deter the sexually-oriented conduct. In support, appellant presents a barrage of authority on the subject of adolescent developmental research. While enlightening, it does nothing to support the proposition that the subject law is incompatible with the United States and Ohio Constitutions.

{¶38} Second, appellant is concerned that this conviction may subject her to sexual offender registry requirements. Currently, however, Ohio treats this as a delinquent offense and *not* a sexual (or child pornography) offense, thus there is no sexual offender classification or reporting requirement associated with a finding of "true"

under the statute. Any such concern is purely speculative and therefore not ripe for consideration by this court.

{¶39} Finally, appellant argues that court action was "the wrong way to combat the issue," as there were plentiful alternatives to the delinquency proceedings. Indeed, the matter could have been converted to an "unruly conduct" disposition. However, the prosecutor has broad discretion in what crimes to charge and whether to pursue those charges. Further, the central question is not whether we, as a judicial body, would have charged appellant under the statute if we were prosecuting the case but, instead, whether the court erred, as a matter of law, in not dismissing the charge.

{¶40} In this matter, we conclude that the court did not err in overruling appellant's motion to dismiss. Appellant's sole assignment of error is without merit.

{¶41} The judgment of the Geauga County Court of Common Pleas, Juvenile Division, is hereby affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.