

SEXUAL PERFORMANCE BY A CHILD AND COMPUTER CRIMES

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Sexual Performance:

Performance is defined as any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

Parker v. State, 2011 WL 4467635 (Fla.App. 2 Dist.):

Defendant was charged with Sexual Performance by a Child because he placed the images of real children on the bodies of adults engaged in sexual conduct. The court ruled that such images did not violate the statute because no children were engaged in sexual conduct. The court said that if the bodies had been those of minors, the images would have been chargeable.

The court provided a good comparison between the federal and state child pornography statutes and suggested the Florida legislature may want to consider expanding their child pornography laws in a similar manner.

Bussell v. State, 2011 WL 3331272 (Fla.App. 1 Dist.):

The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction.

In prosecution of defendant for possessing child pornography, State presented sufficient circumstantial evidence to establish that defendant had constructive possession over the illicit computer images so as to warrant submission of charges to jury; defendant's wife and son both testified they did not download the pornography, defendant worked offshore and admitted he was not working on the days the pornography was downloaded, county investigator testified no illegal material was downloaded when defendant was away working, and both parties' experts testified it was very unlikely someone could have searched for and downloaded the files in question without intending to download child pornography.

Constructive possession exists where the accused does not have physical possession of the contraband, but knows of its presence and can maintain dominion and control over it.

State is not required, in order to survive motion for acquittal in circumstantial evidence case, to rebut conclusively every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence

that is inconsistent with the defendant's theory of events, and once the State introduces such evidence, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Stowe v. State, 2011 WL 2685611 (Fla.App. 1 Dist.)

“The language of the statute does not contemplate a separate conviction for each child depicted in a single photograph, motion picture, exhibition, show, representation, or other presentation.”

Double jeopardy was violated when defendant was convicted for multiple counts based upon multiple children depicted in a single digital video.

Note: This appears to be a case where the defendant possessed a child porn video that was a compilation of multiple child porn video clips. The State argued that the separate videos should be charged separately even though they were combined into a single unit. The court disagreed.

Stelmack v. State, 35 Fla. L. Weekly D2672 (Fla. 2d DCA 2010):

Evidence was insufficient to support convictions for child pornography; defendant was found to be in possession of several images showing faces and heads of two girls, ages 11 and 12, cut and pasted onto images of 19-year-old woman exhibiting her genitals, statute governing offense proscribed knowing possession of photograph or representation that, in whole or in part, includes “sexual conduct by a child,” and no part of any of the images displayed child who was actually lewdly exhibiting her genitals, and only sexual conduct in images was that of an adult.

Bishop v. State, 35 Fla. L. Weekly D2039 (Fla. 5th DCA 2010):

Evidence was sufficient to support conviction for the use of a child in a sexual performance; witness testified that defendant pointed the video camera at the lower part of the victim's body while he rubbed her genital area, the victim testified that the video camera appeared to be on, and defendant was observed pressing various buttons on the video camera as he tried to flee the scene.

The State was not required to prove that a performance was exhibited before an audience in order to obtain a conviction for using a child in a sexual performance; conviction was permitted even where the video tape of the child's engagement in sexual conduct was not shown to third persons

Oquendo v. State, 35 Fla. L. Weekly D45 (2d DCA 2009):

Evidence that defendant told 16-year-old to have sex with another man for money in a private bedroom with no one viewing was insufficient to support conviction for promoting the sexual performance of a child, where there was no performance, as that term was defined in criminal statute, by the defendant.

State v. Brabson, 34 Fla. L. Weekly D7 (Fla. 2d DCA 2008):

The lewdness requirement, under statute setting forth offense of sexual performance by a child, may be satisfied by the intent of the person promoting the performance which included sexual conduct by the child.

State established prima facie case of lewdness so as to require submission to jury of charges of promotion of sexual performance by a child; girls were asked to try on swimsuits under pretense of determining sizes for purposes of placing orders for team swimsuits, defendant, who coached girls' swim team, placed camera in his office, defendant then lured girls to his office, where they otherwise would not have been undressing and changing into suits, but for defendant's cajoling, victims were enticed to change in office with intent that their nude bodies be visible to camera and recorded, and nudity and female genitalia were the focus of defendant's filming.

Denhart v. State, 33 Fla. L. Weekly D1422 (Fla. 5th DCA 2008):

Provision of statute prohibiting promoting a sexual performance by a child defining sexual conduct to include contact with a designated sexual area of a person was satisfied by showing that defendant made contact with minor girl's breast; the statute did not require the child to make contact with designated sexual area of another person.

The statute prohibiting promoting a sexual performance by a child defines sexual conduct broadly enough to cover contact by one party with the designated sexual areas of another party regardless of whether the child victim is making the contact or receiving the contact.

Defendant's contention that he did not know the age of victim was not a defense

to offense of promoting a sexual performance by a child.

Where the state has a compelling interest in protecting underage persons from being sexually abused or exploited, an exception is recognized to the general rule that every crime must include a specific intent, or a mens rea and, so, ignorance of the age of the victim, misrepresentation of age, or a defendant's bona fide belief that such victim is over the specified age are not viable defenses to the offense of promoting a sexual performance by a child.

Photographs of defendant's home, which depicted various articles of pornography hung on the walls of the defendant's home, were admissible in trial for promoting a sexual performance by a child, as relevant to corroborate the testimony presented by the State's witnesses concerning the fact that the crime took place inside the defendant's home and to refute a claim that the photos of the child victim were altered by use of computer software.

Conviction for promoting a sexual performance by a child rendered defendant a sexual predator, under provision of the Sexual Predators Act providing that any felony violation, or any attempt thereof, of certain statutes, including the provision at issue, satisfied sexual predator criteria.

Discussion: There is an interesting concurring opinion where the judges imply that images of a child touching herself may constitute child pornography, but they left the issue undecided.

A.H. v. State, 32 Fla. L. Weekly D243 (Fla. 1st DCA 2007):

16-year-old girl who took lewd photos with her 17-year-old boyfriend could be convicted of promoting a sexual performance by a child.

Defendant's privacy rights were not implicated, and if they were, the State had a compelling interest in prohibiting such conduct.

Strouse v. State, 31 Fla. L. Weekly D 421 (Fla. 4th DCA 2006):

Trial court properly dismissed six counts of possession of child pornography related to temporary internet files. Evidence did not show that defendant knowingly possessed them.

Evidence was sufficient to convict defendant of one count of possession of child pornography because defendant's girlfriend testified that she saw it on the

computer and defendant admitted to her an interest in child pornography.

“To date, the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession.”

State v. Fernandez, 28 Fla. L. Weekly D468 (Fla. 2d DCA 2003):

Evidence that defendant possessed photograph of her six-year-old grandson holding his unclothed, erect sexual organ was sufficient to show prima facie violation of statute. Error to dismiss charge.

Discussion: There is little factual detail contained in this opinion, but it is important to note that the ruling involves a C4 motion to dismiss.

State v. Snyder, 27 Fla. L. Weekly D240 (Fla. 3d DCA 2002):

Offense of use of a child in a sexual performance is a strict liability offense for which consent of the minor victim is not a defense.

Because charged offenses are strict liability offenses, evidence of minor victims' prior behavior is irrelevant to prove consent, and is admissible for limited purpose of challenging the credibility and veracity of victims.

The word “authorizes” as used in 827.071, refers to an adult, whether related to the minor or not, who knowingly permits or allows that minor to engage in a sexual performance in an area over which the said adult has authority, or the ability to exercise dominion or control.

Discussion: The defendant was charged with using a child in a sexual performance and lewd battery. The case alleges that some minors skipped school and attended a sex party at the defendant's video store. The defendant was accused of participating in the sex as well as taking pictures of it. The State file a motion in limine asking the court to preclude the defense from bringing out the prior sexual history of the victims, their drug use, or arguing that they consented to the activity. The court denied the motion and the State appealed. The court ruled that since sexual performance is a strict liability statute, the defense could not use this evidence to argue consent. The defense could use this evidence, however, if it was relevant to the credibility of the victims. The court instructed the trial court to issue a very limiting instruction to the jury advising them “(1) that the said evidence may only be considered by the jurors in determining the question of credibility of the minors who claim that the adult committed the acts prohibited by 827.071(2) and (2) that such evidence may

not, under any circumstances, be considered by the jurors in connection with determining the guilt of the defendant of the offense charged herein once the jurors determine, if they do, that the question of the children's credibility is decided in favor of the children, to-wit: the jurors believe that the Respondent acted contrary to the provisions of section 827.071(2), regardless of, and notwithstanding, any issue or question relating to any alleged or claimed consent."

Veal v. State, 26 Fla. L. Weekly D1563 (Fla. 5th DCA 2001):

Arguments that assistant state attorney's oath on traverse was defective and that state was obligated to furnish name of witness who would testify that images were of actual children are meritless and not preserved.

Discussion: The defendant filed a sworn motion to dismiss several counts of sexual performance by a child based upon the fact that the state could not prove that the computer-generated images were actual children. The court declined to address the substantive issue as to whether the state had to prove the children were actually really children, but stated that the names of witness who would testify to that fact were not required to be in the Traverse.

Fletcher v. State, 26 Fla. L. Weekly D1324 (Fla. 2d DCA 2001): *on second motion for rehearing from 26 Fla. L. Weekly D742 (Fla. 2d DCA 2001), and 26 Fla. L. Weekly D1120 (Fla. 2d dCA 2001)*

Facts: The defendant's twelve-year-old daughter reported finding a camera lens secreted behind grillwork in her bathroom. The angle of the lens was directed at the bathroom mirror, which afforded a view of the bathtub and probably the toilet. The girl also observed a video camera positioned in the upper corner of the bedroom occupied by his seven-year-old daughter. The defendant was employed in the electronics field and had above average knowledge about computers and videos, and had three computers in his home, one of which was connected to the Internet. The defendant spent a lot of time on his computers and his daughter reported seeing pictures of naked women on the computer. The warrant application also provided a behavioral profile for pedophiles, and those who collect and trade child pornography over the Internet.

Holding:

- The presence of the cameras observed only thirteen days prior to the issuance of the warrant sufficiently demonstrated that the information

provided in this case was not stale. It was not necessary that the warrant application allege facts to show that the cameras were operational.

- The warrant in this case merely alleged that hidden cameras were situated in a bedroom and bathroom in the defendant's home. The affidavit contained no facts to establish that these cameras would have captured anything more than innocent conduct such as children using the toilet, dressing and bathing. Based on Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991), the presence of cameras that can only record such conduct does not establish probable cause to suspect possession and/or production of child pornography. Allegations of the defendant's technical knowledge, the description of practices of child pornographers and Internet sites that cater to "kiddy" covert voyeurism, likewise did not establish probable cause to support the warrant in this case.

Discussion: This case severely restricts our ability to prosecute such cases. The best way to prove such cases is to see what is on the video. When we are not allowed to obtain it, we are extremely disadvantaged. The court noted in footnote 1 that the warrant application did not allege suspicions of a violation of F.S. 810.14 (Voyeurism). The implication by the court is that such an addition to the warrant may have contributed to probable cause. The problem with this issue is that voyeurism is a misdemeanor and does not justify a search warrant of a dwelling.

Killian v. State, 761 So.2d (Fla. 2d DCA 2000):

Exhibition before an audience is not required element of sexual performance statute.

Discussion: There is very little discussion about the sexual performance issue. The majority of this opinion concerns *Miranda* issues.

Hudson v. State, 761 So.2d 1161 (Fla. 2d DCA 2000):

Multiple convictions for possession of child pornography with intent to promote were improper.

Crosby v. State, 757 So.2d 584 (Fla. 2d DCA 2000):

Defendant properly convicted of multiple counts of simple possession of child pornography based on several copies of same photograph or computer image.

With regard to statutory provision prohibiting possession of child pornography with intent to promote, defendant found in possession of multiple copies of same article of child pornography during single episode may only be prosecuted for one count.

Wade v. State, 751 So.2d 669 (Fla. 2d DCA 2000):

No merit to argument that prosecutor should have charged defendant on the counts relating to computer hard drive files under F.S.847.0135, which specifically deals with computers and child pornography, rather than under F.S.827.071, which prohibits child pornography in general. The State had the discretion to determine under which statute to charge.

Error to adjudge defendant guilty of multiple counts of possession of child pornography with intent to promote where multiple copies of three different photographs were found during single search of defendant's residence. Only one conviction is allowed for single episode.

Discussion: Once again, the outcome of this case was determined by the distinction between the words "any" and "a". Since the language of F.S.827.071(4) states that it is unlawful for any person to possess with intent to promote *any* photograph, motion picture, etc., there has been a legislative intent to punish a single episode and not individual photos.

State v. Farnham, 752 So.2d 12 (Fla. 5th DCA 2000):

Multiple counts based on defendant's possession of "Zipped" computer archive file, which was contained on 18 separate computer disks in his possession and the individual computer images contained on the 18 disks were appropriate. Trial court erred in dismissing counts based upon individual images contained in the zipped file.

State's charging decision fell properly within the legal parameters regarding units of prosecution because language of Section 827.071 relates to possession of "a" pornographic photographic representation.

Discussion: This case of first impression involved the use of "zipped" files. When someone wants to take numerous files and store them under one file name, they need to purchase a program that "zips" all of these files into one file name. This form of storing computer files is popular on the Internet because an individual can send someone numerous photographic images in one file

attachment. The person receiving this zip file must have a zip program in order to open the file. The defendant in this case had 18 separate floppy disks under the same zip file name. There were 87 separate photographs contained within the single file. The State charged one count for each of the 18 discs plus 87 additional counts for each of the photographs contained therein. The appellate court ruled that this was appropriate because when the word "a" is used in describing contraband, courts have discerned legislative intent that each item of contraband is the basis for a separate unit of prosecution. The defense also argued that it was double jeopardy for the defendant to be prosecuted for the individual discs as well as the various photographs contained therein. The court ruled that this claim was moot and therefore did not have any bearing on the issue.

Nicholson v. State, 748 So.2d 1092 (Fla. 4th DCA 2000):

Florida Statutes 827.071(3) and 827.071(5), governing promoting and possession of a sexual performance by a child, are aimed at protecting persons under the age of 18 from being sexually exploited and do not require that a defendant know that the victim is less than 18 years of age.

Ignorance of the age of the victim, misrepresentation of age, or a defendant's bona fide belief that such a victim is over the specified age, are not viable defenses.

State v. Parrella, 736 So.2d 94 (Fla. 4th DCA 1999):

Defendant, who during single occurrence showed undercover detectives four different videotapes depicting sexual acts involving children, could be prosecuted only on one count of possessing child pornography with intent to promote, since applicable statute specified "any" violative material, rather than "a" piece of violative material.

Thibeault v. State, 732 So.2d 28 (Fla. 2d DCA 1999):

Multiple convictions for attempt to knowingly transmit obscene material to a minor were improper where counts were based on Defendant sending multiple images to undercover officer posing as minor in only one computer transmission.

Discussion: The defendant in this case communicated with an undercover detective on America-On-Line who was posing as a fifteen-year-old boy. The Suspect then sent this detective sexually suggestive photos of children under 16 years of age. All pictures were sent in one transmission. The issue is whether

the Suspect should be charged with one count or several counts for all of the pictures sent. The Appellate Court held the “a/any” test enunciated by the Florida Supreme Court controls under these circumstances. According to the Supreme Court, when the article “a” precedes the item described in the statute it is the intent of the Legislature to make each separate item subject to a separate prosecution. When the article “any” precedes the item, then only one prosecution per criminal episode can take place, even for multiple items. Since F.S.847.0133 uses the term any, then only one count can be charged.

Ladd v. State, 715 So.2d 1072 (Fla. 1st DCA 1998):

Prosecution of 22-year-old man for sexual performance by a child, when his 16-year-old girlfriend willingly allowed him to videotape her performing lewd acts and having sex with him, was not an unconstitutional application of the said statute. The appellant’s conduct clearly fell within proscriptions of statute, and state has compelling interest in preventing sexual exploitation of children as a class.

The following jury instruction is consistent with the evidence presented and correctly states the law:

“The making of a motion picture or videotape which includes sexual conduct by a child less than 18 years of age is in and of itself sufficient to constitute performance even though the motion picture or videotape had never been exhibited before an audience. An individual can constitute an audience even if that individual accidentally played the tape and viewed the performance.”

Trial court properly scored sexual penetration points on sexual performance by a child count where the facts clearly show that the girl in the video was penetrated.

Burk v. State, 705 So.2d 1003 (Fla. 4th DCA 1998):

No error in charging defendant with multiple counts of promoting sexual performance by child predicated on twenty-five nude photographs defendant took of fourteen-year-old stepdaughter. Direction of poses and taking of separate photographs by defendant sufficient to support separate violations of statute for each photograph produced.

Discussion: Note that this case was decided under F.S. 827.071(3) regarding promoting a sexual performance by a child. The text of the statute does not

specifically say that each photograph can be a separate charge. On the other hand, F.S. 827.071(5), which covers the unlawful possession of such a photograph specifically includes language that the possession of each photograph constitutes a separate offense. Therefore if you had assumed the absence of such language would preclude charging separate counts under the promoting section, you assumed incorrectly.

Schneider v. State, 700 So.2d 1239 (Fla. 4th DCA 1997): Goldstein

Statute punishing the possession of material that includes sexual performance by a child covers undeveloped film in defendant's camera.

Discussion: Nine separate photos were on the roll and nine separate charges were filed. The opinion also cites State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997), which holds that possessing a computer image of child pornography is punishable under this statute.

State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997):

For purposes of statute prohibiting person from possessing photograph that includes sexual conduct by child, computer images scanned into computer from magazine photographs qualified as "photographs."

For purposes of statute prohibiting person from possessing representation or other presentation that includes sexual conduct by child, computer image is encompassed by term "representation or other presentation."

Under double jeopardy clause, defendant may be punished for same conduct under both Pornography and Child Exploitation Act (F.S. 847.0135) and statute prohibiting possession of presentations that include sexual conduct by child.

State v. Robinette, 652 So.2d 926 (Fla. 1st DCA 1995):

Prior removal of child's disabilities of nonage is not a defense to charge of employing, authorizing or inducing a child less than 18 years of age to engage in a sexual performance.

Discussion: The trial court dismissed the charge because the child involved had obtained a prior judgment removing disabilities of nonage pursuant to section 39.016. The appellate court ruled that Sexual Performance by a Child is a strict liability crime and F.S. 39.016 has no effect on that.

Breeze v. State, 634 So.2d 689 (Fla. 1st DCA 1994):

Child's act of holding his clothed genitals in his hand did not constitute "sexual performance" such as could support defendant's convictions for use of child in sexual performance and promotion of sexual performance; to constitute "actual lewd exhibition of genitals," within meaning of statutory definition, such exhibition had to be unclothed.

Schmitt v. State, 590 So.2d 404 (Fla. 1991):

Simple, nonobscene nudity in photographs or films is protected form of expression under the First Amendment.

It is not a crime for parent simply to appear unclothed in front of child in family home or child to so appear in front of parent, with no lewd or abusive intent.

Under Florida criminal law, terms "lewd" and "lascivious" are synonymous, with both requiring intentional act of sexual indulgence or public indecency when such act causes offense to one or more persons viewing it or otherwise intrudes upon rights of others; the terms require something more than negligent disregard of accepted standards of decency or even intentional, but harmlessly discreet, unorthodoxy; acts are neither "lewd" nor "lascivious" unless they substantially intrude upon the rights of others.

Under Florida criminal law, deliberately exhibiting one's nude body to passers-by in shopping mall would be lewd and lascivious, while being stripped naked against one's will in the same location would be neither lewd nor lascivious because it was not intentional.

Terms "lewd" and "lascivious" have specialized meaning in context of photographs, films, or other depictions of obnoxiously debasing offensive portrayal of sex acts that can be characterized as obscene.

Any type of sexual conduct involving child constitutes intrusion upon rights of that child, regardless of whether child consents and regardless of whether conduct originates from parent, for purposes of Florida criminal law.

If father's true purpose in alleged taking of nude photographs and video recording of juvenile and friend stripping down to their panties were intentional exploitation of daughter for sexual purpose, father's conduct was "lewd" within meaning of law.

Discussion: This case contains a wealth of information and should be read in its entirety to have a good understanding of this subject matter. The case involved a father who liked taking photos and videos of his nude daughter. No sexual acts were ever performed. There is good law on probable cause to issue search warrants of the suspect's home under these circumstances. The opinion also contains a lengthy discussion of the unconstitutionally overbroad definition of "sexual conduct." This discussion has limited relevance today because the unconstitutional provisions were amended effective October 1, 1991.

Firkey v. State, 557 So.2d 582 (Fla. 4th DCA 1989):

Defendant's making motion picture showing defendant engaged in sexual performance with child was sufficient to sustain conviction for having child engage in sexual performance, even though videotape had never been exhibited before audience.

Hicks v. State, 561 So.2d 1284 (Fla. 5th DCA 1990):

Defendant's ignorance of the victim's age was not a viable defense to conviction for use of a child in a sexual performance.

Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991):

Videotapes which depicted 16 year old girl undressing, showering, and dressing did not show presentation of sexual conduct, needed to support conviction under statute which prohibited possession of motion picture that included sexual performance by child; innocent, everyday acts of child did not depict any of detailed sexual acts specified in statute.

State v. Beckman, 547 So.2d 210 (Fla. 5th DCA 1989):

Statute criminalizing private possession of child pornography did not violate the First Amendment even if applied to possession in the privacy of the home.

Computer Crime Issues:

Allen v. State, 37 Fla. L. Weekly D280 (Fla. 4th DCA 2012):

Instant messages with nude photographs attached that defendant sent to undercover detective who was posing as a 14-year-old girl constituted "electronic mail" within the meaning of statute

making it a felony to transmit, by electronic mail, “an image, information, or data that is harmful to minors” to a specific minor in the state.

Defendant who sent undercover detective who was posing as a 14-year-old girl two instant messages, each with ten nude photographs attached, could be charged with 20 counts of transmitting a harmful image to a minor, representing one for each photograph, rather than just two counts, or one for each instant message; statute punished transmission of “an” image that is harmful to minors, implying that the unit of prosecution was a single image, and detective testified that he had to open each photograph individually, making each a separate image.

Charging defendant with 20 counts of transmitting images harmful to minors, after he sent two instant messages to undercover detective who was posing as a 14-year-old girl, each with 10 nude photographs attached, did not violate double jeopardy; each attached and transmitted photograph was a separate, punishable offense.

King v. State, --- So.3d ----, 2011 WL 1376506 (Fla.App. 4 Dist.)

Trial court, in prosecution for transmission of material harmful to a minor, did not abuse its discretion in declining to instruct jury that “transmission” meant both sending and receiving an image or information; legislature's intent was to punish those who believed they were transmitting harmful material via electronic mail to a minor, regardless of whether the minor received the transmission. [section 847.0138, Florida Statutes \(2007\)](#).

State v. Sholl, 34 Fla. L. Weekly D1953 (Fla. 1st DCA 2009):

Court was in error for dismissing lewd exhibition charge. When defendant exposing himself on a webcam was lewd is a matter for the jury to decide.

Dual convictions for lewd exhibition via webcam and transmission of material harmful to minors by electronic device did not violate double jeopardy.

Defendant's double jeopardy argument was premature and improper basis for dismissal; when information contains two or more charges which amount to same offense, double jeopardy concerns required only that trial judge filter out multiple punishments at end of trial, not at beginning, and double jeopardy protections could not be extended to earlier stage of proceeding, such as filing of information or jury selection, otherwise, trial court would be usurping state's discretion to make strategic decisions about charging alleged criminal activity.

Charge of transmitting image harmful to minors by electronic device did not violate defendant's First Amendment free speech rights; investigator stated that while logged onto email using

undercover identity of 13 year old girl, he received invitation from defendant to view live feed from his web camera, investigator accepted invitation and defendant, over web camera, “exposed his penis” three times, since transmission was sent via instant messenger service, it was precisely type of communication defined as “electronic mail,” and this was not transmission intended for general public viewing, despite fact that email was public website, as it was targeted through instant messenger at one specific individual, namely someone whom defendant believed was 13 years old.

Grohs v. State, 31 Fla. L. Weekly D2938 (Fla. 4th DCA 2006): *on motion for rehearing*

Trial court did not invade the province of the jury by affirmatively answering jury's question of whether contents of cell phone call made following provision of a cell number in an e-mail could be used as evidence to establish that defendant utilized a computer service to seduce, solicit, lure, or entice a minor or a person believed to be a minor to commit an illegal act; by affirmatively answering question, court made a legal determination regarding the scope and meaning of computer solicitation statute, and not a factual determination regarding whether evidence demonstrated a violation of statute.

Evidence was sufficient to support conviction for utilizing a computer service to seduce, solicit, lure, or entice a minor or a person believed to be a minor to commit an illegal act, even though defendant's online statements to police officer posing as 15-year-old boy in “Young Men” chat room avoided explicit references to sexual conduct; tenor of defendant's suggestive comments, including “we can be more, and do whatever makes you happy,” could be interpreted to demonstrate both the adroit artfulness, or enticement, and the enjoyment of active attraction, or allurement, of a predator laying a trap for his prey.

In the absence of a statutory definition of term, a court looks to the term's plain and ordinary meaning, whether expressed in a dictionary or similar statutes.

Discussion: The Court reversed its previous ruling in this case found at 31 Fla. L. Weekly D354 (Fla. 4th DCA 2006), wherein the court previously ruled that the defendant did not violate section 847.0135(3) because the only overt solicitations he made were on the telephone, not on the Internet. In this decision, the court ruled that the language in the Internet communications could be construed by the jury to fit within the luring and enticing language of the statute.

The court provided additional helpful information in that he quoted from the Miriam-Webster dictionary web site to get the common definition of terms like “seduce”, “solicit”, “lure” and “entice.” This approach may help us with formulating jury instructions.

The court also clarified an important issue in that it ruled that the term “solicit” in this statute goes by the common definition of the term and is not the same as the term is used in section

777.04.(2). This issue is directly addressed in footnotes 1 and 2.

FN1. The third issue addresses whether Grohs was charged with a “double inchoate offense” under section 847.0135(3). We reject Grohs's argument on this point because he was not charged with the separate inchoate offense of criminal solicitation under Florida Statutes section 777.04(2). Additionally, there is no indication that section 777.04(2) has any bearing on the definition of “solicit” in section 847.0135(3), especially where criminal solicitation prohibits conduct focused on having another commit a crime in one's stead while section 847.0135(3) criminalizes soliciting a minor to enable an individual to himself commit a crime of sexual battery, lewdness, or child abuse. As such, we affirm as to Grohs's third issue without further comment.

FN2. “Solicit” is defined in the Florida Standard Jury Instructions in Criminal Cases in relation to the inchoate offense of criminal solicitation, see Fla. Std. Jury Instr. (Crim.) 5.2, but for the reasons explained in footnote 1, we reject the applicability of this definition to section 847.0135(3).

It should be noted that the court specifically refused to rule on whether the statute “is intended to criminalize any conduct occurring by telephone” because the defense did not argue the point in his brief.

Finally, it should be noted that the court’s decision substantially complied with my criticism of the original decision when I summarized in my updates. This is the discussion I included in update several months ago:

Discussion: This is a poorly decided case. The appellate court focuses on the term “solicit” and rules that since the actual solicitations occurred on the telephone as opposed to the online communications, the statute was not violated. The majority completely disregards the terms “lure” and “entice” that are also in the statute. When an offender uses the Internet to lure or entice a child into a sexual act, the grooming process used is all part of the luring and enticing. Simply because the magic words are not spelled out in the online communication does not mean the suspect was not engaging in the crime. For instance, when the pedophile lures a child into his car by offering her candy, it is still considering luring. Similarly, an offender may meet and groom a child online, resulting in an invitation to the child home. Once inside, the offender sexually assaults the child. It is hard to imagine that this conduct would not be covered by the statute, but the 4th apparently feels otherwise. It is up to the jury to establish the intent and the offenders intent should be able to be inferred from the circumstances. Hopefully, this case will be appealed.

Simmons v. State, 31 Fla. L. Weekly S794 (Fla. 2006):

Florida “luring” statute, prohibiting luring or enticing a child by use of online service, did not violate dormant Commerce Clause; state had compelling interest in protecting minors from being lured to engage in illegal sexual acts, there was no legitimate interstate commerce interest in communicating with Florida minors for purpose of luring them into sexual activity, statute was narrowed by “intent to seduce” element and requirement that targeted minor reside in Florida, and statute did not extend to conduct taking place wholly outside of Florida’s borders.

Florida statute prohibiting transmission of material harmful to a minor did not violate dormant Commerce Clause; statute applied only to electronic mail (email) and instant message communications, and sender must either know or believe that specific individual who was recipient was a minor located in Florida.

“Electronic mail,” within meaning of Florida statute prohibiting transmission, by electronic mail, of material harmful to a minor, includes both email and instant message communications sent to a specific individual.

Hammel v. State, 31 Fla. L. Weekly D2027 (Fla. 2d DCA 2006):

Defendant was properly convicted of 15 counts of computer child exploitation based upon 15 separate conversations with the undercover detective during the same criminal investigation.

Although all of defendant’s acts were targeted at the same victim, separation of time between conversations shows that defendant had time to pause, reflect, and form new criminal intent before initiating each additional conversation.

Single conversation which spanned two days could only be charged as one count.

Wegner v. State, 31 Fla. L. Weekly D1206 (Fla. 2^d DCA 2006):

Receiving computer transmissions of descriptive or identifying information about a minor for the purpose of sexual conduct with a child does not violate Due Process for failing to require a *mens rea* element.

Because state charged defendant with knowledge and trial court required state to prove knowledge, there was no due process violation.

State v. Ruiz, 909 So.2d 986 (Fla. 5th DCA 2005)

State had subject matter jurisdiction to prosecute defendant for crime of computer pornography even though defendant solicited victim from out-of-state; computer pornography statute contained specific provision which established subject matter jurisdiction over cases where out-of-state perpetrator engaged in conduct proscribed by statute with person perpetrator believed to be child who resided in-state, and evidence presented at trial would establish crime of attempt over which State also exercised jurisdiction for out-of-state actions.

Strouse v. State, 31 Fla. L. Weekly D 421 (Fla. 4th DCA 2006):

Trial court properly dismissed six counts of possession of child pornography related to temporary internet files. Evidence did not show that defendant knowingly possessed them.

Evidence was sufficient to convict defendant of one count of possession of child pornography because defendant's girlfriend testified that she saw it on the computer and defendant admitted to her an interest in child pornography.

"To date, the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession."

State v. Ruiz, 30 Fla. L. Weekly D2146 (Fla. 5th DCA 2005):

State had subject matter jurisdiction to prosecute defendant for crime of computer pornography even though defendant solicited victim from out-of-state; computer pornography statute contained specific provision which established subject matter jurisdiction over cases where out-of-state perpetrator engaged in conduct proscribed by statute with person perpetrator believed to be child who resided in-state, and evidence presented at trial would establish crime of attempt over which State also exercised jurisdiction for out-of-state actions.

Jalbert v. State, 30 Fla. L. Weekly D1672 (Fla. 5th DCA 2005):

No error in denying motion to dismiss child pornography charges on ground that state failed to establish that photographs depicted actual children and were not computer-generated children or adults resembling children.

Question of whether photographs depicted actual children is question of fact, not law, and is appropriate for trier of fact to determine.

Discussion: In dicta, the court noted that the State still has to prove the image is real child at trial, but the court did not discuss the quantum of proof.

Simmons v. State, 29 Fla. L. Weekly D2565 (Fla. 1st DCA 2004):

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the First Amendment, despite defendant's claim that the statute was overbroad because it "limits communications on the Internet to those which would only be suitable for children, thereby depriving adults of their constitutional right to engage in protected speech"; statute only pertained to harmful images, information, or data sent to a specific individual known by the defendant to be minor, "via electronic mail," and thus, because the defendant must have had actual knowledge or believed that the recipient of the communication was a minor, adults are not deprived of their constitutional right to engage in protected speech.

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the First Amendment, despite defendant's claim that the statute was overbroad because it "limits communications on the Internet to those which would only be suitable for children, thereby depriving adults of their constitutional right to engage in protected speech"; statute only pertained to harmful images, information, or data sent to a specific individual known by the defendant to be minor, "via electronic mail," and thus, because the defendant must have had actual knowledge or believed that the recipient of the communication was a minor, adults are not deprived of their constitutional right to engage in protected speech.

The State has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected).

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment was narrowly tailored and not unconstitutionally vague, despite defendant's claim that the statute applied to minors without attempting to classify materials differently for older age groups; Legislature had the responsibility and authority to protect all children, even older ones, and statute was limited to harmful material sent to minors by electronic mail.

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the dormant Commerce Clause; a violator who was not in Florida must have known or believed that he or she was transmitting harmful material to a Florida minor.

Cashatt v. State, 29 Fla. L. Weekly D1026 (Fla. 1st DCA 2004):

Computer Pornography and Child Exploitation Act (847.0135) does not violate First Amendment, is not overbroad or void for vagueness, and does not place discriminatory restrictions on interstate commerce.

Even if statute is considered content-based restriction on constitutionally protected speech, it passes “strict scrutiny” test because it promotes compelling state interest in protecting children from persons who solicit or lure them to commit illegal acts and is narrowly tailored to promote that interest, specifically limiting its prohibitions to communication intended to solicit or lure a child to commit illegal acts.

Use of phrase, “or another person believed by the person to be a child” does not render statute unconstitutional, but simply clarifies the “attempt” portion of the statute.

Claim that statute is overbroad because it chills all sexually oriented communication is without merit, as is claim that statute is vague.

No legitimate commerce is burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.

Effect of statute on interstate commerce is incidental and far out-weighted by state’s interest in prevent harm to minors and does not burden Internet users with inconsistent state regulation.

Statute not invalid for failure to include *mens rea* requirement as to age of victim.

Fact that recipient of “luring” communications was adult undercover agent posing as child is irrelevant to culpability of sender of communications for attempting to lure a child to commit an illegal sexual act.

State’s traverse adequately demonstrated material dispute of ultimate facts, and Internet communications alone constituted prima facie case of guilt under statute.

Karwoski v. State, 29 Fla. L. Weekly D431 (Fla. 4th DCA 2004):

Statute prohibiting speech that amounts to seduction, solicitation and enticement of child to commit a crime is not overbroad or impermissible content-based regulation of speech.

Statute is not overbroad for failing to define the term child.

Fact that potential victim was an undercover officer posing as fifteen-year-old does not

preclude conviction under statute at issue.

Burnett v. State, 28 Fla. L. Weekly D1179 (Fla. 2d DCA 2003):

Conviction of possession of child pornography based on images on computer and diskettes seized in defendant's bedroom reversed where affidavit in support of search warrant failed to set forth crime-specific facts regarding defendant's probable possession of child pornography and the likelihood that it would be found on the computer and diskettes.

Although affidavit properly stated that videotape seized in prior consensual search of defendant's bedroom substantiated allegations of defendant's lewd or lascivious conduct with children, the videotape corroborated only those initial charges and nothing more.

Affidavit failed to describe a factual link between the video camera and the functioning capability of the computer so that images could be transferred, and omitted any factual averment that the computer was linked to the Internet or that the video camera was compatible with the computer so that images could be downloaded, transferred, or transmitted.

Although affiant averred in general terms her experience in investigations involving crimes against children, affiant failed to describe any personal experience with child pornography from which her conclusions concerning defendant were derived.

Discussion: The suspect videotaped two boys engaged in lewd conduct. During a consent search of the defendant's home, the detective found the videotape containing the alleged lewd conduct. Based on this finding, the detective sought a warrant to search the defendant's home and computer for more child pornography. The detective alleged that based on her expertise, the defendant would have child pornography on his computer.

Even though this case ruled against the State, it is a helpful resource for us because it explains how the affidavit could have been done correctly. The court discussed two basic problems in the detective's affidavit. The first problem concerned her expertise in child pornography investigations. She detailed her expertise in child sex abuse investigation, but did not detail her training and experience in child pornography and the habits of child pornographers. The court implied that she could have remedied this by either elaborating on her specific expertise in child pornography *or* by listing the works of other experts in the field. Since she did neither, the affidavit was deemed insufficient.

The second major concern of the court was the detective's conclusory statement that

the computer contained child pornography. The court noted that the detective did not state whether the computer was connected to the Internet or whether it had the capability to connect to the video camera. In conclusion, the affidavit could have been sufficient, but wasn't. The actual language from the detective's affidavit is included in the opinion.

Pendarvis v. State, 752 So.2d 75 (Fla. 2d DCA 2000):

Challenge to warrantless search of Computer hard drive from defendant's office not preserved for appeal where sole objection made when photographs reproduced from pornographic images were introduced was that they were not best evidence.

Hitchcock v. State, 746 So.2d 1143 (FL 5th DCA 1999):

Where defendant was charged with using a computer located in one county to communicate through another computer located in another county, in an attempt to "seduce, solicit, lure, or entice a child, venue was proper in either county."

Hudson v. State, 745 So.2d 997 (Fla. 2d DCA 1999):

Motions to dismiss in which defendant essentially claimed that facts upon which State relied did not establish prima facie guilt should have been brought pursuant to rule 3.190(c)(4), not 3.190(b) and were technically deficient because they were not made under oath.

The trial court correctly decided that information charged a crime supported by an overt act where after preparatory acts of purchasing an advertisement directed to young males in writing his initial correspondence to police detective who responded to add, representing himself to be a 14 year old boy, the Defendant thereafter wrote numerous letters, mailed respondent a plane ticket and money for travel, arranged for a taxi to bring respondent to his house, and then approached the taxi in order to greet respondent.

Police may use a decoy over the age of 16 and still convict the Defendant of attempted lewd and lascivious act. The fact that no boy under the age of 16 was actually involved, does not belie defendant's intent or undermine propriety of trial court's denial of motion to dismiss.

Travers v. State, 739 So.2d 1262 (Fla. 2d DCA 1999):

Where detective engaged in "chat room" conversation with an unidentified chat room participant, detective and chat room participant agreed to meet at a specific time at a

particular church parking lot to engage in illegal activity, and participant described himself as a 26 year old male with brown hair and his vehicle is a black Ford Taurus, officer lacked well founded suspicion justifying stop of Defendant's blue Buick Skylark and detention of Defendant after having twice observed Defendant's vehicle circling through church parking lot at a time when church lights were on and other vehicles were in the parking lot.

Innocent details of chat room conversations were only partially verified because car did not match description, and police failed to observe any additional suspicious circumstances.

Discussion: This case evidently did not involve any of the charges that we typically deal with, but the underlying factual scenario should be helpful when you review warrants concerning Internet chat room cases.

State v. Duke, 709 So.2d 580 (Fla. 5th DCA 1998):

Conduct of defendant in discussing sexual acts on the Internet with detective whom he thought was a 12-year-old child, in arranging to meet "child" to commit sexual acts, and arriving at prearranged meeting point did not reach level of overt act leading to commission of sexual battery as required by attempt statute.

Discussion: Please note that the conduct of the suspect can now be charged under F.S. 847.0135 which makes it a 3rd degree felony for someone to utilize a computer on-line service or Internet service, etc... to solicit, lure, or entice a child or another person believed by the person to be a child to commit any illegal act described in F.S. 794, F.S. 800 or F.S. 827.

State v. Wade, 544 So.2d 1028 (Fla. 2d DCA 1989):

Search warrant could incorporate by reference an attached exhibit in order to supply the required specificity in the description of the property to be seized.

Use of advisers to identify items encompassed by search warrant was permissible where objects of the search warrant were computer equipment and parts which required identification by persons familiar with the particular parts described in the warrant.

Fact that experts who aided law enforcement officers in identifying computer equipment and parts which were subject of search warrant were employees of the victim did not render the search invalid, despite claim of defendant that the seizure resulted in the hauling away of items which crippled his business.

Discovery

Siegel v. State, 2011 WL 3107821 (Fla. 4th DCA 2011):

Trial court did not err in refusing to permit the defense to examine the undercover computer of detective engaged in online communications with defendant. State complied with discovery rules by providing defense with copies of online chats.

United States v. Frabizio, F.Supp (W.D. MA. 2004):

The government retained an expert who wrote a computer program that could distinguish virtual porn from real porn. The defense hired an expert to test the government expert's methods. The court ruled that the defense expert could obtain the child pornography for testing as long as certain controls were in place to prevent copying etc...

State v. Ross, 792 So.2d 699 (Fla. 5th DCA 2001):

Notwithstanding state's broad duty to disclose, state was not obligated to turn over to defendant contraband of computerized images of child pornography.

Defendant failed to demonstrate any prejudice or harm which would be caused by state's proposed procedure for review of the materials, which was to allow defendant, defense counsel, and defense experts to review the images provided Florida Department of Law Enforcement retained control over them.

Any concern that defendant might be required to reveal identity of consulting experts, information which is normally protected by work product privilege, can be adequately addressed by trial court fashioning procedures which would allow consulting experts to review images without identity being disclosed.

Discussion: The court followed the reasoning of United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995).

U.S. v. Cox, 190 F. Supp. 2d 330 (N.D.N.Y 2002):

“Defendant contends that he is entitled to return of the contraband material at issue in this case during the pendency of these criminal proceedings. He is mistaken. The

government has indicated it will make any and all evidence seized from defendant's home and computer available to him for inspection but not copying upon reasonable notice. Defendant provides no factual basis for his assertion that physical possession of the government's evidence is necessary to adequately prepare his defense nor does he cite legal authority which suggests he is entitled to return of illegal materials seized in the course of a criminal investigation. Based thereupon, defendant's motion for a protective order requiring the government to provide him with copies of its physical evidence is DENIED. “

U.S. v. Kimbrough, 69 F.3d 723 (5th Cir. 1995):

Government's refusal to allow defendant to copy seized child pornography as part of discovery process did not violate discovery rule, since child pornography was illegal contraband.

U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999):

Trial court did not err in denying defendant's request for copies of video tapes since the tapes were prima facie contraband. Government's offer to allow defendant's expert to view the tapes was sufficient.

United States v. Hill, F.Supp (C.D.CA 2004) **Computer**

- Defense counsel and his expert have a right to copies of child pornography to prepare their defense. Requiring them to examine images at government lab would be unduly burdensome.

Discussion: This case provides an example of the court order placing conditions on defense counsel to ensure images were not misused.