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Opinion No. 13-83

Duty of School Officials to Report Student's Sending of Photographs Depicting Nudity of Minor

QUESTION

Are school officials required to report incidents in which a student electronically transmits images depicting nudity, whether of the sender or another, to another student?

OPINION

Pursuant to Tenn. Code Ann. § 37-1-605, a court would probably determine that school officials must report such incidents where (1) the photographs depict a child; (2) the nudity involves lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area; and (3) the officials have knowledge of or reasonable cause to suspect these attendant circumstances related to the incident.

ANALYSIS

School officials who know or have reasonable cause to suspect that a child has been sexually abused must report the abuse to the Tennessee Department of Children's Services ("DCS"), to a judge having juvenile jurisdiction, or to the sheriff or chief law enforcement official of the municipality where the child resides. Tenn. Code Ann. § 37-1-605(a)(4), (b)(1). See also Tenn. Code Ann. § 37-1-403(a)(3) (requiring reporting in accordance with § 37-1-605 even if the child has sustained no apparent injury as a result of sexual abuse).[1] If the abuse occurred on school grounds or while the child was under the supervision or care of the school, the principal or other person designated by the school must, in coordination with DCS, verbally notify the child's parent or guardian within twenty-four hours of reporting the abuse to DCS. Tenn. Code Ann. § 37-1-605(d)(1). See also Tenn. Code Ann. § 37-1-403(h)(2) (recapitulating this requirement notwithstanding certain laws respecting confidentiality of records).

For purposes of these provisions, "child sexual abuse" is defined by Tenn. Code Ann. § 37-1-602. As relevant here, such abuse includes "the commission of any act involving the unlawful sexual abuse, molestation, fondling or carnal knowledge of a child under thirteen (13) years of age that on or after November 1, 1989, constituted the criminal offense of . . . [s]exual exploitation of a minor under § 39-17-1003." Tenn. Code Ann. § 37-1-602(a)(3)(B)(ix). The

[1] Any person required to report known or suspected child sexual abuse who "knowingly and willfully fails to do so" commits a Class A misdemeanor. Tenn. Code Ann. § 37-1-615(a).

definition additionally includes "[t]he sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to . . . [e]ngage in an act prohibited by § 39-17-1003." Tenn. Code Ann. § 37-1-602(a)(3)(C)(vi)(b). For purposes of Tenn. Code Ann. § 37-1-602(a)(3)(C), a "child" is defined by Tenn. Code Ann. § 37-1-102(b)(4) in most cases to include only a person under 18 years of age.

The provisions of Tenn. Code Ann. § 39-17-1003 define the crime of "sexual exploitation of a minor," providing, in part, that it "is unlawful for any person to knowingly possess material that includes a minor engaged in . . . [s]exual activity." Tenn. Code Ann. § 39-17-1003(a)(1). "Sexual activity" means, among other things, "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person." Tenn. Code Ann. § 39-17-1002(8)(G). In considering whether a visual depiction of a minor constitutes lascivious exhibition, courts examine six factors, though they are "neither comprehensive nor necessarily applicable in every situation." *State v. Whitlock*, No. E2010–00602–CCA–R3CD, 2011 WL 2184966, at *6 (Tenn. Crim. App. June 6, 2011) (quoting *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999)). The factors are:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
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> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
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> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
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> 4) whether the child is fully or partially clothed, or nude;
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> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at *4 (quoting *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). The last factor is analyzed objectively; that is, it is applied when the visual depiction is intended or designed to elicit a sexual response in the average viewer, rather than looking to the subjective response by the defendant. *Id.* at *6.

The question posed concerns the practice commonly known as "sexting," where a student electronically transmits images depicting nudity, whether of the sender or another, to another student. As pertains to the reporting obligations of school officials in such situations, the practice raises questions whether a student can "exploit" himself or herself, whether one child can exploit another, and whether the consent of the person being photographed makes a difference. In construing the relevant statutes, the paramount rule "is to ascertain and give effect

to legislative intent without broadening the statute beyond its intended scope." *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009). Courts "begin with the words that the General Assembly has chosen" and "must give these words their natural and ordinary meaning." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). When a statute's text is unambiguous, the courts need not look beyond the statute itself to ascertain its meaning. *Id.* at 527. When courts encounter an ambiguity, they construe the statute's meaning by examining "the broader statutory scheme, the history of the legislation, or other sources." *Hayes v. Gibson County*, 288 S.W.3d 334, 337 (Tenn. 2009) (internal quotation marks omitted).

The provisions of Tenn. Code Ann. § 37-1-602 are not entirely clear on the question presented. Section 37-1-602(a)(3)(B) defines "child sexual abuse," in part, as "unlawful sexual abuse." Reading the latter term in connection with its succeeding words ("molestation, fondling or carnal knowledge"), the provision might be interpreted to require some form of sexual contact beyond mere nudity. The Court of Criminal Appeals has ruled, however, in a case in which the child victim took pictures of herself in various states of undress and masturbating, that especially aggravated sexual exploitation of a minor amounts to "sexual abuse" for purposes of consecutive sentencing because especially aggravated sexual exploitation of a minor is listed as one of the qualifying offenses under § 37-1-602(a)(3)(B). *State v. Burda*, No. M2006-02523-CCA-R3-CD, 2009 WL 1181349, at *1, 15-16 (Tenn. Crim. App. May 4, 2009), *See also State v. Lonie*, No. M2009-01894-CCA-R3-CD, 2010 WL 3516160, at *3-5 (Tenn. Crim. App. Sept. 9, 2010) (reaffirming *Burda* in light of conflicting authority). *Burda* suggests that the courts do not read the term "unlawful sexual abuse" restrictively, such that conduct beyond that specified in the qualifying offenses is required to make out an instance of child sexual abuse. Because sexual exploitation of a minor is listed as a qualifying offense, Tenn. Code Ann. § 37-1-602(a)(3)(B)(ix), and because "lascivious exhibition" of nudity can satisfy it, Tenn. Code Ann. § 39-17-1002(8)(G), Section 37-1-602(a)(3)(B) can trigger a reporting obligation on the part of a school official in sexting cases, but only where the child depicted is under thirteen and the official has knowledge (or reasonable suspicion) of the attendant circumstances.

The provisions of Tenn. Code Ann. § 37-1-602(a)(3)(C)(vi)(b) are also ambiguous on the issue presented. This statute defines "child sexual abuse" as "[t]he sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to . . . [e]ngage in an act prohibited by § 39-17-1003. *Id.*" Sexual exploitation of a child is generally a possessory offense (i.e., the offender must possess the prohibited material), but the subsection does not appear to require that the minor engage in prohibited possession of explicit materials; rather, the minor must engage in the "sexual activity" that the prohibited materials depict. *See* Tenn. Code Ann. § 39-17-1003(a)(1). *Burda* is instructive with respect to this subdivision as well. There the court considered whether corroboration of the thirteen-year-old victim's testimony was required on account of her being an accomplice. *Burda*, 2009 WL 1181349, at *10-11. The court ruled: "E.B. could be charged with violating sections 39-17-1003, -1005 in that she possessed and promoted photographs of a minor (herself) while engaging in sexual activity." *Id.* at *11. *Burda* thus recognizes that a minor can "self-exploit." It follows from this precept that consent is no defense and, further, that one child can "exploit" another. In that regard, § 39-17-1003 contains no age requirement for the possessor of exploitative materials, and § 37-1-602(a)(3)(C)—unlike § 37-1-602(a)(3)(B)—does not limit the age of victims to under thirteen years. In view of these

authorities, § 37-1-602(a)(3)(C)(vi)(b) can trigger a reporting obligation on the part of school officials in sexting cases where the image depicts a child engaged in the lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area.

School officials must know or have reasonable cause to suspect that a child has been sexually abused before a duty to report arises. Tenn. Code Ann. § 37-1-605(a)(8). Not every depiction of nudity—for example, those intended to embarrass the subject of the photograph or those made in jest—will amount to "lascivious exhibition" for purposes of the sexual exploitation laws. As a practical matter, officials often will need to have viewed the photographs (or have been advised of their content) in order to have the requisite knowledge or suspicion. Officials may exercise sound judgment in determining whether an image is "sexually suggestive," reflects a "willingness to engage in sexual activity," and is designed to "elicit a sexual response," *see Whitlock*, 2011 WL 2184966, at *6, such that reporting to DCS and to parents is required.

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