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Shue v. State of Nevada, 133 Nev. Adv. Op. 99 (Dec. 14, 2017)

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CRIMINAL APPEAL: CHILD PORNOGRAPHY

Summary

The Nevada Supreme Court held that (1) under NRS 200.710(2), knowingly using a minor as the subject of a sexual portrayal in a performance, the proper unit of prosecution is one conviction *per each distinct minor* appearing as the subject of a sexual portrayal in a performance; (2) under NRS 200.730, the “simultaneous possession at one time and place of [multiple] images depicting child pornography constituted *a single violation* of NRS 200.730”; (3) the statute barring the “sexual portrayals” of minors are not overbroad and do not violate the First Amendment or the Due Process Clause of the United States Constitution because the statute is clearly defined to penalize only unprotected expression; and (4) the act of kissing a minor on the mouth, in public, without consent, is insufficient to sustain a conviction of lewd conduct without further testimony regarding the nature of the kiss.

Background

Appellant Joshua Shue was convicted of child abuse and neglect,² 29 counts of use of a child in the production of pornography,³ 10 counts of possession of visual representation depicting the sexual conduct of a child,⁴ and one count of open or gross lewdness.⁵ In 2010, Shue began periodically staying with his then-girlfriend and her three children H.I. (age 15), K.I. (age 11), and F.I. (age 10).

Over the course of two years, Shue periodically secretly videotaped H.I. and K.I. in the bathroom, fully nude, performing bathroom activities. A few of the videos capture both children on the same recording. In August 2012, Shue snuck up behind H.I. (age 17) and used a small digital camera to take a picture underneath her skirt. That same evening, Shue kissed H.I. on her mouth without her consent. In addition to the videos of H.I. and K.I., the police also found a “digital image of one young male fellating another young male” and “images of a boy with his genitalia and buttocks exposed.”

Discussion

Shue’s convictions under NRS 200.710(2) are not impermissibly redundant

Shue argued that only one conviction should apply for each of the videos in which more than one minor is depicted. NRS 200.710(2) makes it a category A felony when a person “knowingly uses, encourages, entices, coerces or permits *a minor* to be the subject of a sexual portrayal in a performance.” After applying the rules of statutory interpretation and reviewing *Casteneda v. State*,⁶ the Court determined that the language “a minor” unambiguously denotes a

¹ By Molly Higgins

² NEV. REV. STAT. § 200.508

³ NEV. REV. STAT. § 200.710(2)

⁴ NEV. REV. STAT. § 200.730

⁵ NEV. REV. STAT. § 201.210

⁶ 132 Nev. Adv. Op. 44, 373 P.3d 108 (2016).

singular object of offense and thus the proper unit of prosecution is each distinct minor appearing as the subject of a sexual portrayal in a performance. Thus, Shue was properly convicted of 29 counts of use of a child in the production of pornography.

Shue is entitled to have 9 of his 10 convictions under NRS 200.730 vacated

Shue argued that 9 of his 10 convictions for possession of child pornography should be vacated because “the state did not prove that he possessed the disputed images and video files at different times or locations.” NRS 200.700 criminalizes the “knowing and willful possession of *any film, photograph or other visual presentation*” that depicts a minor under age 16 as the subject of sexual portrayal. After applying the rules of statutory interpretation and reviewing *Casteneda v. State*, the Court determined that the language “any” was ambiguous because it could mean “one or more.” In *Casteneda*, the Court applied the rule of lenity and determined that charges under NRS 200.730 could only be brought on a “per-possession” rather than a “per-image” basis and that “simultaneous possession at one time and place of [multiple] images depicting child pornography constituted a single violation.” Here, although each video was created on a different day there was insufficient evidence of distinct acts of possession because it was unclear whether Shue transferred each video to his computer every day, or whether he recorded for a long period of time and then transferred multiple videos to his computer at once. Therefore, the lower court improperly relied on a per-image basis rather than a per-possession basis and the Nevada Supreme Court vacated 9 of Shue’s 10 convictions for possession of child pornography.

Nevada’s statutes barring the “sexual portrayals” of minors do not violate the First Amendment or the Due Process Clause of the United States Constitution

Shue argued that the statutes criminalizing the production and possession of sexual portrayals of minors violate the First Amendment as unconstitutionally overbroad because there are circumstances in which visual portrayals of nude children should not be criminalized. NRS 200.700(4) defines “sexual portrayal” as “the depiction of a person in a manner which appeals to prurient interest in sex and which does not have serious literary, artistic, political or scientific value.” After reviewing the United States Supreme Court’s definition of “prurient” in *Brockett v. Spokane Arcades, Inc.*,⁷ the Nevada Supreme Court held that NRS 200.700(4) defines “sexual portrayal” as “depiction of a minor in a manner that appeals to a shameful or morbid interest in the sexuality of the minor”—a form of obscenity not protected under the First Amendment. Further, after reviewing *Osborne v. Ohio*,⁸ the Court determined that the phrase, “which does not have serious literary, artistic, political or scientific value,” sufficiently limited the statutes operation to avoid penalizing all depictions of nude minors. Thus, the Court rejected Shue’s First Amendment and Due Process claims.

There is insufficient evidence to support Shue’s open or gross lewdness conviction

Shue argues that, by merely kissing H.I., he did not engage in open or gross lewdness under NRS 201.210. The Court determined that the definition of the phrase “lewd” pertained to “sexual conduct that is obscene or indecent” or conduct that is “evil, wicked or sexually unchaste or

⁷ 105 S. Ct. 2794, 472 U.S. 491 (1985).

⁸ 110 S. Ct. 1691, 495 U.S. 103 (1990).

licentious.” Here, although Shue kissed H.I. without her consent, and although the kiss made H.I. feel uncomfortable and scared, there was insufficient evidence regarding the nature of the kiss for any reasonable trier of fact to find that the conduct was “lewd.” Thus, the Court reversed Shue’s conviction of open or gross lewdness.

Conclusion

The District Court properly convicted Shue for *each* minor depicted in each video file under NRS 200.710 and the Court affirmed all 29 counts of use of a child in the production of pornography.

Because convictions for possession of images depicting the sexual portrayal of minors must be counted on a per-possession rather than a per-image basis, the Court determined that there was insufficient evidence to prove that Shue possessed each image at distinct or separate times and places. Therefore, the Court vacated 9 of the 10 possession convictions.

Additionally, Nevada’s statutes that criminalize the production and possession of images depicting the sexual portrayal of minors are not overly broad and do not violate the First Amendment or Due Process Clause of the Constitution.

Finally, the Court reversed Shue’s conviction of open or gross lewdness because there was insufficient evidence regarding the nature of the kiss for any reasonable trier of fact to find that the kiss was so lustful or sexually obscene to be considered “lewd.”