

Turning 19, Sex Crimes and Technology

By Hon. Richard D. Sievers, Nebraska Court of Appeals

Introduction.

The commonly accepted definition of “sexting” is the sending or receiving of nude, partially nude, or sexually suggestive or explicit photos, often of one’s self via cell phone or computer, or the forwarding of such items that have been received to others. “A recent survey showed that 22% of teenage girls have sexted their own picture and 29% of teens have received such pictures third hand. Due to the fact that teens do not have a fully developed frontal lobe until the age of 21 or 22 years (the part of the brain responsible for controlling impulses and possible consequences of behaviors) and 99% of teens have a phone and peer pressure this is a dangerous situation.” Mary Jo Rapini, *Sex Texting and Your Teen*, (February 3, 2011), at <http://marviorapini.com/the-girls-corner/119-sex-texting-and-your-teen.html>. Corey O’Brien, a Nebraska Assistant Attorney General who frequently speaks to Nebraska middle school students about sexting, reports that when he asks for a show of hands of those students as to whether they have sent or received “sexttexts” the affirmative response rate is 2/3 to 3/4 of the students.

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There are a number of potential practical consequences of sexting, aside from the potential legal consequences. Such photos have a tendency to be forwarded to others, often after the “break-up” of the young people who were sexting in the context of their relationship. Once the relationship has ended, the impulse to share and forward the risqué photos may take over. An Associated Press story in late January 2010 reported that a 14-year-old boy in Lacey, Washington, was arrested after police say he forwarded a photo of his naked 13-year-old ex-girlfriend by cell phone to dozens of students in at least three different schools. Thus, such photos are unlikely to remain private. Plus, the pictures or videos can be around “forever” as

they are passed from person to person via the Internet, or made public--and unless the device's hard drive is destroyed or "washed" the photos can be found on the hard drive even if "deleted" because they are not really deleted. Sexting can result in adverse consequences for future relationships, one's reputation, and career prospects. In short, what began as youthful impulsive behavior can have long-lasting adverse consequences in many areas of a young person's life. Consequently, there are some very solid commonsense reasons that minors and young adults should think twice before hitting the "send" key for sexually explicit material.

Age of Majority and Consequences for Sex Crimes.

We begin the discussion of sexual conduct and the age of majority with some general legal limitations on sexual conduct that occur under Nebraska law as a result of the simple fact of reaching age 19, although it should be pointed out that by Nebraska statute if a person is married under the age of 19 "his or her minority ends." See Neb. Rev. Stat. § 43-2101 (Reissue 2008). Potentially, the most serious consequence for sexual behavior that occurs from reaching age 19 is what is commonly called "statutory rape" or what the law calls first degree sexual assault. This crime occurs when there is sexual penetration, which incidentally can be sexual conduct other than intercourse, such as oral sex, when the actor is 19 or older and the victim is at least 12 years of age but less than 16. First degree sexual assault is a Class II felony that results in a sentence of 1 to 50 years' imprisonment, plus conviction results in the offender being placed on the Sex Offender Registry which will substantially impact where one can live and work, as well as placing serious restrictions on freedoms normally taken for granted. Consent of the underage victim is no defense to a statutory rape charge, nor is the actor's belief that the victim was 16 or older, no matter how reasonable that belief might have been. If the victim is under age 12 the penalties are even more severe. This crime, first degree sexual assault of a child, is a class IB felony that results in a mandatory minimum sentence of 15 years' imprisonment and a maximum sentence of life imprisonment. Sexual contact without penetration when the actor is 19 or older and the other person is 14 or younger is also a crime--second or third degree sexual assault of a child--the degree depending on whether the action

causes “serious personal injury to the victim.” Thus, in summary, conduct of a sexual nature that may have been legal can suddenly become illegal, and a serious crime, upon reaching age 19.

Sexting.

Turning specifically to sexting, Nebraska has the Child Pornography Prevention Act which has the following as its core provision: “It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.” See Neb. Rev. Stat. § 28-1463.03(1) (Cum.Supp. 2010). The Act also makes it unlawful for “a person knowingly to purchase, rent, sell, deliver, distribute, display for sale, advertise, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.” § 28-1463.03(2). The Act defines sexually explicit conduct as: “(a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between human and an animal or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the person involved[.]” Neb. Rev. Stat. § 28-1463.02(5) (Cum.Supp. 2010). Therefore, the range of sexual behavior that falls within the Act is clearly all encompassing.

“... the range of sexual behavior that falls within the [Child Pornography] Act is clearly all encompassing.”

The Nebraska Supreme Court has made it clear that under the Child Pornography Prevention Act “a child participant” is one under age 18. See *State v. Seters*, 270 Neb. 19, 699 N.W.2d 810 (2005); § 28-1463.02(1). In the *Seters* case, the court upheld the conviction of a 28-year-old high school teacher who, although without any intent to sell or otherwise

disseminate the tape, videotaped himself having sexual relations with his 17-year-old female student/girlfriend--who had consented to both the sexual relations and the videotaping. Citing the Act, the court said that while the 17-year-old student could legally consent to having sexual relations with the 28 year old, the teacher's videotaping of the act was illegal. The court's reasoning included the following observation: "It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week." See *State v. Sinters*, 270 Neb. at 26, 699 N.W.2d at 817.

As might be expected, the Child Pornography Prevention Act also makes it illegal to "force" or otherwise cause a child to engage in the visual depiction of sexually explicit conduct either as a participant or observer. Likewise, it is illegal for a parent, stepparent, or other person having custody or control of a child to "authorize" or "consent" to a child engaging in the visual depiction of sexually explicit conduct. In 2009, the Nebraska Legislature amended the Act to include a definition of "visual depiction"

so as to bring sexting within the definition of the conduct prohibited by the Act. Visual depiction now includes, in addition to live performance or photographic representation, "any undeveloped film or videotape or data stored on a computer disk or by other electronic means which is capable of conversion into a visual image

. . . includ[ing] . . . digital image, or computer-displayed image, video, or picture, whether made or produced by electronic, mechanical, computer, digital, or other means." See Neb. Rev. Stat. § 28-1463.02(6). However, the Legislature in its 2009 amendments to the Act created two affirmative defenses--meaning that the burden of proving entitlement to the defense is on a defendant, whereas the burden of proving the facts that make up the charged crime is always on the prosecution.

A violation of the Child Pornography Prevention Act is a Class III felony with mandatory 1-year imprisonment (20 year maximum) and/or \$25,000 fine if the defendant is under 19 at the time of the violation.

The affirmative defenses to the charge of the creation, publication, or providing of the visual depiction of sexually explicit conduct that has a child as one of its participants or portrayed observers require that the defendant was less than 18 years of age at the time the visual depiction was created **and** the sexually explicit conduct includes no person other than the defendant. See Neb. Rev. Stat. § 28-1463.03(5) (Cum.Supp. 2010). In other words, a 17-year-old may lawfully create a visual depiction of himself or herself engaging in sexually explicit conduct so long as no other person is involved. Insofar as what may lawfully be done with a visual depiction involving only the person creating it who is also under age 18, the Legislature amended the statute to provide a second affirmative defense. The second defense comes into play if the image was sent to another person and the defendant “had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient, and . . . the recipient was at least fifteen years of age at the time the visual depiction was sent.” See Neb. Rev. Stat. § 28-1463.03(6). Summarized, if such a visual depiction is sent to another person, presumably by computer or cell phone, the creator of the visual depiction has to not only be the only person portrayed, but the creator of the depiction has the burden to prove that the recipient was willing to receive it and was at least 15 years of age. The Legislature’s intent in its amendments to the Child Pornography Prevention Act was not to regulate sexting between adults, but rather to regulate sexting involving children by limiting who can lawfully create the images, defining what images are unlawful, who the images can be sent to, and what a defendant has the burden to prove as an affirmative defense.

A violation of the Child Pornography Prevention Act is a Class III felony carrying a minimum of 1 year and a maximum of 20 years’ imprisonment, a \$25,000 fine, or both, if the defendant is under 19 at the time of the violation. If the defendant is older than 19 at the time of the violation, the crime is a Class ID felony with a maximum of 50 years’ imprisonment and a mandatory sentence of 3 years. And, if the defendant has previously been convicted of a sex crime, the penalties for violation of the Act are increased. Furthermore, each act can be

considered a separate claim, in other words, sending an illegal image to 12 of your best friends can result in 12 separate charges of violating the act.

Obscene Material.

In addition to the potential criminal consequences of violating the Child Pornography Prevention Act, those who have reached the age of majority could be subject to prosecution as adults under Nebraska statutes dealing with obscene material. Nebraska law provides as follows at Neb. Rev. Stat. § 28-813 (Reissue 2008):

(1) It shall be unlawful for a person knowingly to (a) print, copy, manufacture, prepare, produce, or reproduce obscene material for the purpose of sale or distribution, (b) publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material, (c) have in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promote any obscene material or performance.

(2) (intentionally omitted)

(3) A person commits an offense of promoting obscene material if knowing its content and character he or she (a) disseminates for monetary consideration any obscene material, (b) produces, presents, or directs obscene performances for monetary consideration, or (c) participates for monetary consideration in that part of a performance which makes it obscene.

(4) Any person who violates this section shall be guilty of a Class I misdemeanor [penalty is up to 1 year imprisonment, a \$1,000 fine, or both].

Whereas the Child Pornography Prevention Act deals with sexually explicit visual depictions that involve children, the obscene material statute quoted above deals with content of a sexual nature that is legally “obscene.” The key to whether this crime has been committed is the word “obscene.” Non-obscene material is generally protected free speech under the First Amendment to the U.S. Constitution, although as outlined before sexually explicit depictions

involving children are not constitutionally protected. Courts across the country have struggled for many years with what is and is not obscene. Nebraska statutes define the term as follows:

Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct . . . and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

Neb. Rev. Stat. § 28-807(10) (Reissue 2008). In the end, the people applying “contemporary community standards” are either judges, or in the instance of a jury trial, citizens from the community who comprise the jury. But the penalties for the production and distribution of obscene material are misdemeanors and thus substantially less than those provided for in violation of the Child Pornography Prevention Act. Misdemeanors generally carry a maximum of 6 months’ jail time. This lesser penalty, as compared to those involved with child pornography, undoubtedly reflects the Legislature’s desire to protect children, as well as recognition that crimes of this nature involving children, as opposed to consenting adults, are far more serious.

Internet Solicitation.

Given that this is the computer age, those who are turning 19 and thus viewed by the law as adults should be aware that there are computer uses that involve sex that can run afoul of the law and have very serious penalties. Nebraska has a statute, Neb. Rev. Stat. § 28-320.02 (Cum.Supp. 2010) that provides that:

(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of an electronic communication device[,] . . .

to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

The enumerated statutes define the conduct at which the enticement or solicitation is directed. It is sufficient for our discussion that all of these statutes involve illegal sexual acts with underage children. It is further important to point out that a violation of this statute does not require that the defendant actually complete the prohibited sexual act, for example a 19-year-old having intercourse with a 15-year-old. Rather, the statute is violated by the simple act of soliciting a child to engage in the illegal conduct. For example, a message in an Internet chat room from a 19-year-old young man asking an underage girl to meet him at the city park so they can have sex is a violation of the Act. It is the “asking” or “coaxing” that is the crime, and it is not necessary that there be an underage girl on the other end of the chat--it can be, and oftentimes is, when such cases are prosecuted, an older male police officer posing as a 14- or 15-year-old girl. Thus, in these cases, the men involved (and they are typically males), who attempt to prey on young girls using the Internet are very surprised to find that they end up meeting a group of police officers--not a supposedly willing young girl. It might be interesting to point out that when police officers run such “Internet stings” they always reveal that the girl they are pretending to be is underage. Nonetheless, those who are prosecuted under the computer enticement statute because of a police “Internet sting” forge ahead despite the disclosure that the girl they think they are talking to is underage. This crime is a Class ID felony carrying a maximum sentence of 50 years’ imprisonment, and a mandatory minimum sentence of 3 years’ imprisonment.

Conclusion.

There is the well-known, and true, statement that “ignorance of the law” is no defense. But, knowledge of the law can avoid serious difficulties with life-long consequences. By outlining the impact of turning 19 with respect to sex crimes, perhaps a child will not be victimized and a young adult will avoid becoming a convicted criminal--the consequences of which are lifelong.