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Contact: James Hallinan

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(505) 660-2216

Attorney General: Supreme Court Ruling Critical Victory for Protecting New Mexico Children

Santa Fe, NM – Today, Attorney General Hector Balderas announced that the Supreme Court agreed with the Office of the Attorney General’s interpretation of a 2007 law designed to protect children from obscene electronic communications. The law says that an adult can face felony charges for “sending [a] child obscene images of the person's intimate parts by means of an electronic communication device.” Defendant Robert Tufts was convicted under this law after he recorded nude videos of himself, placed the videos on a cell phone, and gave the phone to a 15-year-old girl, saying there was “a surprise” on the phone for her.

“I am thankful for the Supreme Court’s ruling today as it is a critical victory in protecting New Mexico’s children,” said Attorney General Balderas.

The issue before the Supreme Court was whether Tufts “sent” the videos to the young girl. The Office of the Attorney General argued that because the law was meant to protect children from obscene images, the law applied even when the suspect hand-delivered a device containing the images. The Supreme Court agreed and rejected Tufts’ argument that he did not violate the law because he did not use a network. “The communication,” the Supreme Court wrote, “could not have been more direct.”

Please see attached for a copy of the Supreme Court ruling.

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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:**_____

3 **Filing Date: June 2, 2016**

4 **NO. S-1-SC-35255**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Petitioner,

7 v.

8 **ROBERT GEORGE TUFTS,**

9 Defendant-Respondent.

10 **ORIGINAL PROCEEDING ON CERTIORARI**

11 **Marci Beyer, District Judge**

12 Hector H. Balderas, Attorney General

13 Kenneth H. Stalter, Assistant Attorney General

14 Santa Fe, NM

15 for Petitioner

16 Bennett J. Baur, Chief Public Defender

17 Kimberly Chavez Cook, Assistant Appellate Defender

18 Santa Fe, NM

19 for Respondent

1 **OPINION**

2 **CHÁVEZ, Justice.**

3 {1} Defendant Robert Tufts, a male in his late thirties, filmed himself masturbating,
4 saved the electronic image on a secure digital (SD) memory card, inserted the card
5 into a cell phone, handed the cell phone to a fifteen-year-old girl (Child) with whom
6 he had developed an intimate but non-sexual relationship, and told her there was a
7 surprise on the phone for her. Defendant was convicted of criminal sexual
8 communication with a child in violation of NMSA 1978, Section 30-37-3.3 (2007).
9 The Court of Appeals reversed the conviction, holding that “ ‘to send[,]’ when used
10 to describe the act of causing another person to receive a physical object[,] evokes the
11 notion of a third-party carrier,” and therefore, when Defendant hand-delivered
12 obscene electronic images to Child, he did not “send” the images to her by means of
13 an electronic communication device. *State v. Tufts*, 2015-NMCA-075, ¶¶ 15, 18, 355
14 P.3d 32, *cert. granted*, 2015-NMCERT-006. For the reasons that follow, we reverse
15 the Court of Appeals and remand this case to that Court for resolution of Defendant’s
16 remaining claims.

17 **DISCUSSION**

18 {2} Section 30-37-3.3(A) defines the crime of criminal sexual communication with
19 a child as follows:

1 Criminal sexual communication with a child consists of a person
2 knowingly and intentionally communicating directly with a specific
3 child under sixteen years of age by sending the child obscene images of
4 the person's intimate parts by means of an electronic communication
5 device when the perpetrator is at least four years older than the child.

6 An " 'electronic communication device' means a computer, video recorder, digital
7 camera, fax machine, telephone, pager or any other device that can produce an
8 electronically generated image[.]" Section 30-37-3.3(C)(1). Defendant only argues
9 that his conduct of placing an SD memory card in a cell phone and handing that
10 phone to Child cannot constitute "sending" under Section 30-37-3.3.

11 {3} This case presents a purely legal issue of statutory interpretation which we
12 review de novo. *State v. Office of the Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029,
13 ¶ 13, 285 P.3d 622. "Our principal goal in interpreting statutes is to give effect to the
14 Legislature's intent." *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865; *see*
15 *also* NMSA 1978, § 12-2A-18(A)(1) (1997) (holding that if possible, we will
16 construe a statute or rule to "give effect to its objective and purpose"). Rules of
17 statutory construction are provided by both the Legislature in the Uniform Statute and
18 Rule Construction Act, *see* NMSA 1978, §§ 12-2A-1 to -20 (1997), and by New
19 Mexico case law.

20 {4} We must construe "sending" as it is used in Section 30-37-3.3(A) to give effect

1 to the Legislature’s objective and purpose. *See State v. Ogden*, 1994-NMSC-029, ¶
2 34, 118 N.M. 234, 880 P.2d 845 (“A criminal statute must be interpreted in light of
3 the harm or evil it seeks to prevent.”). We will first turn to the plain language of
4 Section 30-37-3.3(A) to guide our interpretation. *See* § 12-2A-19. To be convicted
5 of violating Section 30-37-3.3(A), a defendant must knowingly and intentionally
6 communicate directly with a specific child by “sending the child obscene images of
7 [the defendant’s] intimate parts by means of an electronic communication device
8” We attribute the usual and ordinary meaning to words used in a statute. *State*
9 *v. Melton*, 1984-NMCA-115, ¶ 16, 102 N.M. 120, 692 P.2d 45. We often use
10 dictionaries for guidance as to the usual and ordinary meaning of words. *See State*
11 *v. Nick R.*, 2009-NMSC-050, ¶ 18, 147 N.M. 182, 218 P.3d 868. We agree with the
12 Court of Appeals’ use of the online Oxford Dictionaries to ascertain the ordinary
13 meaning of “send” as to “ ‘[c]ause to go or be taken to a particular destination;
14 arrange for the delivery of, especially by mail[,]’ and secondarily, as ‘[c]ause (a
15 message or computer file) to be transmitted electronically[.]’ ” *Tufts*, 2015-NMCA-
16 075, ¶ 15 (alterations in original) (quoting Oxford Dictionaries,
17 http://www.oxforddictionaries.com/us/definition/american_english/send (last visited
18 May 13, 2016)). However, we disagree with the Court of Appeals’ conclusion that

1 “ ‘to send’ ” requires transmitting an object to another by means of a third-party
2 carrier. *Tufts*, 2015-NMCA-075, ¶ 15.

3 {5} Communicating directly with a child by means of an electronic communication
4 device may occur through a third-party carrier such as social media, internet forums
5 and message boards, online file-sharing services, text message, or email. However,
6 it may also occur by delivering the electronic communication device containing the
7 obscene images of the defendant directly to the child. It does not matter whether the
8 delivery was by the defendant or a third-party carrier; someone had to cause the
9 electronic images to go or be taken to a particular destination—in this case, that
10 someone was Defendant, and the destination was Child. The history and purpose of
11 the statute support this interpretation.

12 {6} The New Mexico Legislature enacted Section 30-37-3.3 in 2007. However,
13 this was not its first legislative effort to enact a law that criminalizes sexual
14 communication with a child. In 1998, the Legislature enacted a law intended to
15 protect minors from sexual communication and images in the digital age by
16 prohibiting dissemination of harmful materials via computer. *See* 1998 N.M. Laws,
17 ch. 64, § 1 (codified as NMSA 1978, Section 30-37-3.2). The 1998 version of
18 Section 30-37-3.2(A) prohibited a person, through

1 the use of a computer communications system that allows the input,
2 output, examination or transfer of computer data or computer programs
3 from one computer to another, to knowingly and intentionally initiate or
4 engage in communication with a [child] when such communication in
5 whole or in part depicts actual or simulated nudity, sexual intercourse
6 or any other sexual conduct.

7 1998 N.M. Laws, ch. 64, § 1. Notably, with its specific reference to a “computer
8 communications system,” this crime prohibited “sending” images in the narrow sense
9 of electronic transmission. Shortly thereafter, the Tenth Circuit Court of Appeals
10 affirmed an injunction barring enforcement of Section 30-37-3.2(A) on the grounds
11 that it unconstitutionally violated First Amendment rights to free speech by burdening
12 otherwise protected adult communications on the Internet. *See Am. Civil Liberties*
13 *Union v. Johnson*, 194 F.3d 1149, 1160, 1164 (10th Cir. 1999) (*ACLU*). The court
14 concluded that the statute was over broad because it could potentially be applied to
15 all communications on the Internet since (1) it only required a general knowledge that
16 children might view the material, and (2) it could not be read to prohibit conduct
17 targeting a specific child. *Id.* at 1159. The Legislature subsequently eliminated this
18 crime through a 2005 amendment to the statute. 2005 N.M. Laws, ch. 295, § 1.

19 {7} In 2007, the Legislature added Section 30-37-3.3 to the Act, which defined
20 criminal sexual communication with a child. 2007 N.M. Laws, ch. 67, § 1. We
21 presume that “the legislature acted with full knowledge of relevant statutory and

1 common law.” *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M.
2 573, 855 P.2d 562. Therefore, we assume that the Legislature drafted the language
3 of Section 30-37-3.3(A) with the constitutional holding by *ACLU* in mind.
4 Consequently, Section 30-37-3.3(A) requires a person to “knowingly and intelligently
5 communicat[e] *directly* with a *specific child*” (Emphasis added.) In contrast to
6 the 1998 version of Section 30-37-3.2, Section 30-37-3.3(A)’s additional focus on
7 direct communication targeting a specific child could seemingly be achieved through
8 an electronic transmission or by directly handing the child an electronic
9 communication device containing forbidden material. This statutory history provides
10 us with important context as to the meaning of “sending” in Section 30-37-3.3(A), but
11 we also look to the purpose of the statute for further guidance. *See State v. Cleve*,
12 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23.

13 (8) The elements of the offense of criminal sexual communication with a child
14 reveal the purpose of Section 30-37-3.3(A), which is to protect children under sixteen
15 from being targeted by an adult and provided with obscene images of the adult’s
16 intimate parts on a device that can produce, store, or distribute the electronic images.
17 The Legislature enacted Article 37 of the Criminal Code, “Sexually Oriented Material
18 Harmful to Minors,” because “children do not have the judgment necessary to protect

1 themselves from harm” NMSA 1978, § 30-37-9 (1983). The harm targeted by
2 Section 30-37-3.3(A) consists of an adult attempting to pique a specific child’s
3 prurient interest in the adult by directly communicating to the child obscene
4 electronic images of the adult. *See* NMSA 1978, § 30-37-1(C), (F)(1) (1973)
5 (defining what sexually oriented material is harmful to minors as including an act of
6 “masturbation” that “predominantly appeals to the prurient . . . interest” of a minor).
7 Whether a digital camera, a video recorder, or a cell phone is handed directly to a
8 child or an image is electronically transmitted to one of those devices, the effect of
9 the conduct and the resulting harm to the child—access to obscene electronically
10 generated images via an electronic communication device—is the same. *Cf. Ogden,*
11 *1994-NMSC-029, ¶ 34* (discussing the purpose of a statute meant to deter killings of
12 law enforcement officers and applying the statute to the killing of Community Service
13 Officers in order to ensure that the evil the statute was enacted to deter was deterred).
14 We cannot confine the definition of “sending” to encompass only electronic
15 transmissions because doing so would frustrate the purpose of the legislation.

16 {9} In this case, Defendant gave Child at least two cell phones over several months,
17 which they used to text or talk to each other on a daily basis. As their non-sexual
18 relationship progressed, Defendant recorded himself nude and masturbating, saved

1 the files to an SD memory card, and placed the SD card in a cell phone which he
2 handed to Child, exclaiming that there was a surprise for her on the phone. The
3 communication could not have been more direct, and it was achieved through a
4 telephone or a device capable of “produc[ing] an electronically generated image[,]”
5 which was specifically defined by the Legislature as an “ ‘electronic communication
6 device.’ ” Section 30-37-3.3(C)(1). Defendant handed the cell phone with the
7 memory card that he inserted into the phone to Child, and it was with that cell phone
8 that Child produced the obscene electronically generated image of Defendant which
9 he intended Child to view. Defendant’s argument that he is not guilty of violating
10 Section 30-37-3.3(A) because he did not transmit the obscene electronic image to
11 Child through a third-party carrier is without merit.

12 **CONCLUSION**

13 {10} We reverse the Court of Appeals’ determination that Defendant did not “send”
14 the pictures of himself under Section 30-37-3.3(A) and remand the case to the Court
15 of Appeals for consideration of his other claims.

16 {11} **IT IS SO ORDERED.**

17
18

EDWARD L. CHÁVEZ, Justice

1 **WE CONCUR:**

2 _____
3 **CHARLES W. DANIELS, Chief Justice**

4 _____
5 **PETRA JIMENEZ MAES, Justice**

6 _____
7 **BARBARA J. VIGIL, Justice**

8 _____
9 **JUDITH K. NAKAMURA, Justice**