STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: OCTOBER 24, 2012)

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**P2-2012-0571A**
	:	
EMILIO VILLEGAS	**:**	

DECISION

McBURNEY, M., Before this Court, pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure[1] and Rhode Island General Laws 1956 § 12-12-1.7,[2] is the Motion of Emilio Villegas ("Villegas" or "Defendant") to Dismiss Counts Two and Three of the Amended[3] Criminal Information.[4] Specifically, Defendant alleges that Count Two, which

[1] Rule 9.1 of the Rules of Criminal Procedure for the Superior Court states:

> "A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time."

[2] Rhode Island General Laws 1956 § 12-12-1.7 states:

> "Within thirty (30) days after a defendant is served with a copy of an information charging him or her with an offense, he or she may move in the superior court to dismiss the information on the ground that the information and exhibits appended to it do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. Upon the filing of the motion to dismiss the court shall schedule a hearing to be held within a reasonable time."

[3] The Criminal Information was amended on August 6, 2012 to include a third count of manufacturing child pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(1).

charges possession of child pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(4), and Count Three, which charges manufacturing child pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(1), should be dismissed because the statute on which the State relies is unconstitutionally vague, and the video on which the State relies for charging Defendant fails to meet the statutory criteria for child pornography. Therefore, Defendant argues that there is no probable cause to believe that the charged crimes were committed, and accordingly, the charges should be dismissed. For the reasons set forth below, this Court denies Defendant's Motion to Dismiss.

I. Facts and Travel

On December 1, 2011, while looking for her remote car starter, Defendant's wife, Maria Villegas ("Maria"[5]), went into her bedroom, which she and Defendant no longer shared at that time. In that room, she found a box of new VHS tapes. Her family did not use VHS tapes, so the box piqued her interest. Maria further noticed that there was a VHS tape in the VCR, and she hit play. Upon hitting the play button on the VCR, she observed video of her fifteen-year-old daughter ("Jane"[6]), Defendant's step-daughter, as she was naked in the bathroom getting ready to take a shower. Maria immediately called the police.

Pawtucket Police Officers arrived at the home, and while they were there, Defendant arrived. The Defendant was informed that the police were present because of the VHS tapes. At that time, Defendant stated that he had problems, and that he no longer had the video

[4] Based on the filings of Defendant, he does not dispute that there is probable cause to support Count One, which charges video voyeurism. Therefore, this Court will not analyze whether there is probable cause for Count One.

[5] For the sake of clarity, this Court shall hereinafter refer to Defendant's wife by her first name. This Court certainly intends no disrespect.

[6] To protect the privacy of the alleged child victim in this case, the Court has given her a fictitious name.

camera. He further stated that the video was from a long time ago. After Defendant was brought to the police station and read his Miranda rights, he made statements that he had a "masturbation problem," that he had placed the camera in the corner of the bathroom to record his step-daughter, and that "her body had started to change in the last few months." While he was at the police station, Maria called to tell the police that she had found the hidden bathroom camera. When the police went to the house to seize that camera and a connected DVR, they discovered a second camera hidden in Maria's daughter's bedroom. This camera was seized by police. The Defendant claimed that the bedroom camera had never worked, and no footage of the bedroom was found on the DVR or VHS tape.

The VHS tape contained a number of clips of Jane in the bathroom. Throughout the video clips, her naked breasts and buttocks are readily apparent. It is clear from the footage that she is unaware of the camera. The State has alleged that two separate clips meet the definition of child pornography. In each of the two clips at issue, she is completely nude for a substantial duration. The content revolves entirely around Jane undressing, preparing for a shower, and dressing after her shower. Those clips are a combined five minutes in duration, and they involve up-close shots of her genitalia. The shots are not the result of Defendant's zooming or cropping the video; rather, they are the result of Defendant's placement of the camera in the bathroom floorboard at an upward angle. Furthermore, it is clear from the video that the clips were subject to at least minimal editing: the clips each begin after Jane is in the bathroom, and each end before she leaves. Additionally, the only footage on the tape is of Jane, and no footage exists on the tape of his wife or their guests. Moreover, Defendant edited out portions of the video in which Jane was in the shower, retaining only the portions of film in which she was in front of the camera, and either substantially or completely naked.

Thereafter, Defendant was charged with video voyeurism in violation of section 11-64-2, possession of child pornography in violation of section 11-9-1.3(4), and manufacturing of child pornography in violation of section 11-9-1.3(1).

By agreement of the parties, this Court also engaged in an in camera viewing of the video, which is at the core of these allegations.

II. Analysis

A. The Statute Is Not Unconstitutionally Vague

The Defendant argues that section 11-9-1.3 is unconstitutionally vague. The alleged vagueness lies in the singular term "graphic" in subsection (c)(8), and Defendant claims that therefore, the definition of child pornography under section 11-9-1.3(c)(6)(v) must only be interpreted as lascivious conduct. The State, in contrast, argues that the section is not unconstitutionally vague, but is sufficiently specific and defined to provide notice to individuals and prevent arbitrary and discriminatory enforcement.

The vagueness doctrine, rooted in the Due Process Clause of the Fifth Amendment, rests upon three essential values. First, it serves to ensure that statutes are sufficiently clear, so that "a person of ordinary intelligence" receives "fair notice of what is prohibited." United States v. Williams, 553 U.S. 285, 304. In State v. Authelet, our Supreme Court cautioned, "[i]f a criminal act is set forth in a statute in uncertain terms, the innocent may be trapped by inadequate warning of what the state forbids." 120 R.I. 42, 45, 385 A.2d 642 (1978) (citing State v. Picillo, 105 R.I. 364, 252 A.2d 191 (1969)). Second, when laws provide "explicit standards for those who apply them," the danger of discriminatory enforcement is alleviated. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). Vague laws perpetuate "arbitrary and discriminatory enforcement" by delegating basic policy decisions to "policemen, judges,

and juries for resolution on an ad hoc and subjective basis." Id. Third, the vagueness doctrine serves to maintain uninhibited exercise of First Amendment freedoms. "Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms," citizens are likely to "steer far wider of the unlawful zone" than necessary, impinging on protected speech. Id. (internal quotations omitted). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Williams, 553 U.S. at 304 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)). Rather, for a statute to be vague, it must tie "criminal culpability to . . . wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." Id. at 305.

In this case, Defendant contends that the term "graphic" in section 11-9-1.3 is unconstitutionally vague in violation of the Due Process Clause. Section 11-9-1.3 makes it a felony to knowingly possess or produce any film or videotape that contains an image of child pornography. Under the statute, "child pornography" means "any visual depiction, including any photograph, film, [or] video . . . of sexually explicit conduct." See § 11-9-1.3(c)(1)(ii). The statute defines "sexually explicit conduct" to include "[g]raphic or lascivious exhibition of the genitals or pubic area of any person." Sec. 11-9-1.3(c)(6). Although the statute does not give a definition for "lascivious," it provides that "'[g]raphic,' when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted." Sec. 11-9-1.3(c)(8). A Rhode Island Superior Court has previously noted that "[t]his definition is undoubtedly circular—in defining sexually explicit conduct, the statute uses the term graphic, yet in defining the term graphic,

the statute refers back to sexually explicit conduct." State v. Norman, No. P2-08-1791A, 2010 WL 390914 (R.I. Super. Ct. Jan. 28, 2010).

Nonetheless, despite the term's lack of clarity, this Court concludes that the statute is not unconstitutionally vague because it does not (1) "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited," (2) "authorize[] or encourage[] seriously discriminatory enforcement," or (3) unduly inhibit exercise of First Amendment freedoms. See Williams, 553 U.S. at 304; see also Hill v. Colorado, 530 U.S. 703, 732 (2000); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).

First, the term "graphic" does not fail to provide notice of what is prohibited to a person of ordinary intelligence. See Williams, 553 U.S. at 304. Although the statute may define "graphic" in a circular way, the ordinary meaning of the term provides sufficient guidance to ensure that the term is appropriately limited to specific conduct. See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); see also Wilcox v. Ives, 864 F.2d 915, 917 (1st Cir. 1988). In its ordinary meaning, "graphic" means "[d]escribed in vivid detail" or "sharply outlined or set forth." Webster's New College Dictionary 486 (2d ed. 2001). Thus, in the context of child pornography, the statute proscribes the possession or production of a vividly detailed or sharply outlined visual depiction of the genitals or pubic area of any child.

Further supporting a conclusion that the statute does not fail to provide notice of prohibited conduct to a person of ordinary intelligence, in interpreting similar statutes, other courts have concluded that the term "graphic" is susceptible to a common understanding and is not unconstitutionally vague. See, e.g., Osborne v. Ohio, 495 U.S. 103, 111-12 (1990);

State v. Gann, 796 N.E.2d 942, 947 (Ohio Ct. App. 2003). For example, in Gann the Court of Appeals of Ohio held that the phrase "graphic focus on the genitals" was not unconstitutionally vague, but was "plainly susceptible of common understanding and [gave] persons with ordinary intelligence fair warning as to what conduct [was] proscribed." Gann, 796 N.E.2d at 947. Likewise, this Court concludes that the term "graphic" in the Rhode Island Child Pornography statute is not unconstitutionally vague, because it is susceptible to a common meaning and gives notice to a person of average intelligence of prohibited conduct.

Similarly, the term "graphic" is not unconstitutionally vague because it does not "authorize[] or encourage[] seriously discriminatory enforcement." See Williams, 553 U.S. 304; see also Hill, 530 U.S. at 732; Village of Hoffman Estates, 455 U.S. at 494-95. The United States Supreme Court has declared a statute unconstitutionally vague when it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. Kolender v. Lawson, 461 U.S. 352, 361 (1983). The statute should not encourage arbitrary enforcement by "furnish[ing] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," or "confer[ring] on police a virtually unrestrained power to arrest and charge persons with a violation." Kolender, 461 U.S. at 360-61 (1983) (internal citations and quotation marks omitted) (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

This prohibition against arbitrary enforcement prevents the enforcement of statutes when there has been no "meaningful attempt to limit or properly define" the term at issue. Lewis, 415 U.S. at 133. In Coates v. City of Cincinnati, for example, the United States

Supreme Court held that a statute proscribing "annoying" conduct was unconstitutionally vague because no standard of conduct was specified at all. 402 U.S. 611, 614 (1971). The Supreme Court invalidated the statute at issue, because the statute failed to provide language to limit an entirely subjective term proscribing vast swaths of constitutionally protected conduct.

In contrast, in this case, Defendant has failed to prove that the term "graphic" would furnish a convenient tool for harsh and discriminatory enforcement, or confer unrestrained power to arrest. Furthermore, as noted above, the statute's use of the term "graphic" is limited by its common meaning and therefore provides sufficient guidance to prevent harsh and arbitrary enforcement. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); Coates, 402 U.S. at 614.

Finally, the term is not unconstitutionally vague because it does not unduly inhibit exercise of First Amendment freedoms. See Williams, 553 U.S. at 304; see also Hill, 530 U.S. at 732; Village of Hoffman Estates, 455 U.S. at 494-95. Although the First Amendment prohibits the government from abridging the freedom of speech, the freedom of speech has its limits. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002). The First Amendment does not, for example, protect pornography produced with real children. Ashcroft, 535 U.S. at 245-46; New York v. Ferber, 458 U.S. 747, 764 (1982).

Furthermore, courts have declined to hold statutes proscribing child pornography unconstitutionally vague, even when those statutes could possibly reach protected expression. See, e.g., Ferber, 458 U.S. at 774; United States v. Knox, 32 F.3d 733, 752 (3d Cir. 1994). In Ferber, for example, the Supreme Court declined to hold that a statute proscribing "lewd exhibition of the genitals" was unconstitutionally overbroad. 458 U.S. at 764-65. Although

the court reasoned that the statute could reach some protected expression—such as the depiction of a child's genitals in a medical textbook or National Geographic—it concluded that those hypothetical expressions represented a "tiny fraction of the materials within the statute's reach." Id. at 773. Similarly, here, although Defendant argues that the term "graphic" reaches protected expression, the mere fact that a statute incidentally seems to include protected uses does not automatically invalidate it. See id.; Knox, 32 F.3d at 752; see also United States v. Matthews, 209 F.3d 338, 347 (4th Cir. 2000) (declining to invalidate child pornography statute when "impermissible applications of a child pornography statute would be rare").

Therefore, judging the statute as a whole, this Court does not find the use of the term "graphic" to be unconstitutionally vague. The statute survives Defendant's attack because the challenged term provides to a person of ordinary intelligence fair notice of what is prohibited, does not authorize or encourage discriminatory enforcement, and does not unduly inhibit the exercise of First Amendment rights.

B. Probable Cause

1. Standard of Review

It is well settled that "[w]hen addressing a motion to dismiss a criminal information, a [Superior Court] justice is required to examine the information and any attached exhibits to determine whether the state has satisfied its burden to establish probable cause to believe that the offense charged was committed and that the Defendant committed it." State v. Martini, 860 A.2d 689, 691 (R.I. 2004) (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)); see also State v. Aponte, 649 A.2d 219, 222 (R.I. 1994); State v. Reed, 764 A.2d 144, 146 (R.I. 2001). Further, when ruling on a motion to dismiss, "the trial justice should grant the state

'the benefit of every reasonable inference' in favor of a finding of probable cause." State v. Young, 941 A.2d 124, 128 (R.I. 2008) (quoting State v. Jenison, 442 A.2d 866, 875-76 (R.I. 1982).

Additionally, "[t]he probable-cause standard applied to a motion to dismiss is the same as that for an arrest." Aponte, 649 A.2d at 222. "Probable cause to arrest 'consist[s] of those facts and circumstances within the police officer's knowledge at the moment of arrest and of which he had reasonably trustworthy information that would warrant a reasonably prudent person's believing that a crime has been committed and that the prospective arrestee had committed it.'" Id. (quoting State v. Usenia, 599 A.2d 1026, 1029 (R.I. 1991)). Thus, probable cause sufficient to support an information is established when, after taking into account relevant facts and circumstances, a reasonable person would believe that the charged crime occurred and was committed by Defendant. Furthermore, a trial justice's finding of probable cause "may be based in whole or in part upon hearsay evidence or on evidence which may ultimately be ruled to be inadmissible at the trial." Sec. 12-12-1.9.

2. Probable Cause Has Been Satisfied

The State has submitted sufficient evidence that a reasonable person would believe that the charged crimes occurred and were committed by Defendant. From the information package and the evidence this Court viewed—specifically the edited video clips—there was content that was a "lascivious exhibition of the genitals or pubic area of any person." See §11-9-1.3(c)(6).

There is probable cause to believe that a video contains a graphic exhibition of a child's genitals when the video contains images of a child's genitals that are up-close, detailed, and specifically defined, or when images are focused or framed such that the child's

face appears to be of little or no importance. Indeed, "prominent almost clinical," displays of young women's genitals have been termed "graphic depictions." United States v. Pryba, 900 F.2d 748, 751 (4th Cir. 1990). Further, prohibiting content which focuses on, or prominently displays, the genitalia or pubic areas of children furthers the purposes of child pornography laws by safeguarding the physical and psychological well-being and limiting the sexual exploitation of minors. See Ferber, 458 U.S. at 756-57.

In this case, the edited clips contain graphic exhibitions of Jane's pubic area. The clips depict her naked as she prepared for a shower, and in each of the clips at issue, there is a span of time in which her genitals take up most of the screen as she stands closer to the hidden camera. In each of those shots, her pubic area is portrayed up-close and in-detail. The camera is framed around her pubic area, and neither her upper body, nor her lower legs are visible. Thus, in those shots, her face appears to be of little or no importance. See Pryba, 900 F.2d at 751; United States v. Amirault, 173 F.3d 28, 33 (1st Cir. 1999). Rather, her groin is featured in the center of the composition as the most important aspect.

Furthermore, in determining whether the visual depiction focuses on the child's pubic area, this Court must consider the positioning of the camera used to capture the images. When a camcorder is positioned in a way likely to capture visual images of a child's naked pubic area, a court may reasonably infer that capturing such an image was the purpose in placing the camcorder. See United States v. Johnson, 639 F.3d 433, 441 (8th Cir. 2011). In this case, the recording device was positioned in a manner designed to capture visual images of the genital or pubic area: it was hidden in the bathroom floorboard in a manner to capture Jane in a state of undress. Although not all of the edited clips prominently display

Jane's pubic area, the camera was hidden and arranged to capture her naked body. The Court finds that the resulting footage is sufficient to support probable cause.

The next issue is whether there is sufficient probable cause to believe that the video contains lascivious content within the meaning of section 11-9-1.3. As our Supreme Court has yet to interpret this section, this Court looks to analogous federal decisions interpreting federal child pornography statutes for guidance in its application. See 18 U.S.C. § 2256(2)(B)(iii) (proscribing "graphic or simulated lascivious exhibition of the genitals or pubic area of any person"); see also State v. Byrne, 972 A.2d 633, 641 n.11 (R.I. 2009) (noting similarity between Rhode Island and federal child pornography statutes).

Federal courts have recognized that the "graphic" or "lascivious" nature of the content at issue is a case-specific determination that must be established based on the totality of the circumstances. See, e.g., United States v. Wallenfang, 568 F.3d 649, 658 (8th Cir. 2009); Amirault, 173 F.3d at 32; United States v. Knox, 32 F.3d at 747; United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987).

Specifically, courts have applied the list of factors articulated in United States v. Dost:

> "1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> 4) whether the child is fully or partially clothed, or nude;
> 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."

Dost, 636 F. Supp. at 828; see also Wallenfang, 568 F.3d at 657-58 (applying the Dost factors as guidance to determine whether a depiction is lascivious); Amirault, 173 F.3d at 32 (noting that although the Dost factors provide "specific, workable criteria" in determining whether content is "lascivious," that other factors will also be evaluated, and that "[t]he inquiry will always be case-specific"); Knox, 32 F.3d at 747 (concluding that fact-finders must determine whether content is lascivious "using the Dost factors and any other relevant factors given the particularities of the case"). The Dost factors are not exhaustive; they are, however, "generally relevant and provide some guidance in evaluating whether the display in question is lascivious." Amirault, 173 F.3d at 31-32.

Applying the Dost factors to the edited clips at issue, there is probable cause to believe that the offenses were committed because the video clips depicted a lascivious exhibition of Jane's pubic area. See Dost, 636 F. Supp. at 828. In weighing the first factor, a jury could reasonably conclude that the focal point of the video and pictures was of the child's pubic area. In the video, the camera was positioned in a location where it would be likely to, and did, in fact, capture footage of Jane's pubic area. Likewise, in the frames in which her pubic area is most prominent, the camera is focused on her vagina, and her face is not visible. In weighing the second factor, the bathroom is a sexually suggestive location because it is a highly private location in which a person is likely to be naked. In the present context, Defendant staged the hidden camera there to take advantage of the nature of a location as one in which a person is likely to be naked, with the purpose of capturing Jane in a state of undress. The third factor appears to be inapplicable to the content at issue because Jane is not depicted in unnatural poses, as she is not aware that the camera is present. Nonetheless, the fourth factor is implicated because she was completely nude throughout the

edited video clips and because her genitals, breasts, and buttocks were exposed in the video clips. The fifth factor—whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity—is not applicable because Jane was unaware that she was being recorded. Finally, the Court finds that the sixth factor—that the depiction was intended or designed to elicit a sexual response in the viewer—was met. The voyeuristic quality of the videos, in combination with Defendant's statements that he had a "masturbation problem" and that his step-daughter's body had changed in recent months, support a conclusion that the videos were intended to elicit a sexual response in the viewer. See, e.g., State v. Myers, 207 P.3d 1105, 1115 (N.M. 2009) (concluding that facts supported conclusion that images were designed to elicit a sexual response in the viewer when the voyeuristic quality of the images from the hidden video camera were used for a sexual purpose). Further supporting this conclusion is the fact that the videos were edited to exclude spans of time in which Jane was in the shower and not visible to the camera, or was clothed.

Although the clips may not meet all the Dost factors, a depiction need not meet all the Dost factors to be lascivious. United States v. Wolf, 890 F.2d 241, 247 (10th Cir. 1989). Requiring a depiction to involve all the Dost factors "would ignore the obvious exploitative nature of the depiction and require the child to exhibit lust, wantonness, sexual coyness or other inappropriate precocity. Such an interpretation would pervert both the language and the logic of the legislation and the case law." Id. at 246.

Although Jane is partially clothed in some of the depictions, that fact alone does not preclude a finding that the images are graphic or lascivious. In fact, in United States v. Knox, the United States Court of Appeals for the Third Circuit noted that visual depictions of clothed genitalia may fall within the meaning of "lascivious exhibition of the genitals or

pubic area," and thereby qualify as child pornography. 32 F.3d at 754. Therefore, where, as here, the determination of whether the content at issue is "lascivious" or "graphic" is highly-fact specific, and where "the spectrum of constitutionally unprotected pornographic material [is] broader" because a child is the subject matter of the content, it is inappropriate for this court to dismiss for lack of probable cause. See id. at 750.

IV. Conclusion

For the reasons set forth above, the Court finds the existence of probable cause to believe that the offenses of possession of child pornography in violation of Rhode Island General Laws 1956 § 11-9-1.3(4) and manufacturing child pornography in violation of section 11-9-1.3(1) have been committed and that Defendant committed them. Thus, the Motion to Dismiss is denied.