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HOUSE BILL 2424

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State of Washington

61st Legislature

2010 Regular Session

By Representatives O'Brien, Pearson, Hurst, Takko, Herrera, Chandler, Ross, Rodne, Dammeier, Condotta, Shea, Klippert, Smith, Walsh, Parker, McCune, Campbell, Johnson, Eddy, Morrell, Kelley, Short, Sullivan, Conway, Kagi, Roach, Kristiansen, Bailey, Haler, Schmick, Ericks, Warnick, Ormsby, Moeller, and Hope; by request of Attorney General

Prefiled 12/07/09. Read first time 01/11/10. Referred to Committee on Public Safety & Emergency Preparedness.

1 AN ACT Relating to protecting children from sexual exploitation and  
2 abuse; amending RCW 9.68A.110, 9.68A.011, 9.68A.050, 9.68A.060, and  
3 9.68A.070; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** Due to the changing nature of technology,  
6 offenders are now able to access child pornography in different ways  
7 and in increasing quantities. By amending current statutes governing  
8 depictions of a minor engaged in sexually explicit conduct, it is the  
9 intent of the legislature to ensure that intentional viewing of and  
10 trading in child pornography over the internet is subject to a criminal  
11 penalty without limiting the scope of existing prohibitions on the  
12 possession of or dealing in child pornography, including the possession  
13 of electronic depictions of a minor engaged in sexually explicit  
14 conduct. It is also the intent of the legislature to clarify, in  
15 response to State v. Sutherby, 204 P. 2d 916 (2009), and other recent  
16 case law, that each individual item of "visual or printed matter"  
17 constitutes a separate violation for purposes of determining the unit  
18 of prosecution under the statutes governing possession of and trading  
19 in depictions of a minor engaged in sexually explicit conduct.

1       **Sec. 2.** RCW 9.68A.110 and 2007 c 368 s 3 are each amended to read  
2 as follows:

3       (1) In a prosecution under RCW 9.68A.040, it is not a defense that  
4 the defendant was involved in activities of law enforcement and  
5 prosecution agencies in the investigation and prosecution of criminal  
6 offenses. Law enforcement and prosecution agencies shall not employ  
7 minors to aid in the investigation of a violation of RCW 9.68A.090 or  
8 9.68A.100. This chapter does not apply to lawful conduct between  
9 spouses.

10       (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or  
11 9.68A.080, it is not a defense that the defendant did not know the age  
12 of the child depicted in the visual or printed matter: PROVIDED, That  
13 it is a defense, which the defendant must prove by a preponderance of  
14 the evidence, that at the time of the offense the defendant was not in  
15 possession of any facts on the basis of which he or she should  
16 reasonably have known that the person depicted was a minor.

17       (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.101, or  
18 9.68A.102, it is not a defense that the defendant did not know the  
19 alleged victim's age: PROVIDED, That it is a defense, which the  
20 defendant must prove by a preponderance of the evidence, that at the  
21 time of the offense, the defendant made a reasonable bona fide attempt  
22 to ascertain the true age of the minor by requiring production of a  
23 driver's license, marriage license, birth certificate, or other  
24 governmental or educational identification card or paper and did not  
25 rely solely on the oral allegations or apparent age of the minor.

26       (4) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070,  
27 it shall be an affirmative defense that the defendant was a law  
28 enforcement officer or a person specifically authorized, in writing, to  
29 assist a law enforcement officer and acting at the direction of a law  
30 enforcement officer in the process of conducting an official  
31 investigation of a sex-related crime against a minor, or that the  
32 defendant was providing individual case treatment as a recognized  
33 medical facility or as a psychiatrist or psychologist licensed under  
34 Title 18 RCW.

35       (5) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070,  
36 the state is not required to establish the identity of the alleged  
37 victim.

1       **Sec. 3.** RCW 9.68A.011 and 2002 c 70 s 1 are each amended to read  
2 as follows:

3       Unless the context clearly indicates otherwise, the definitions in  
4 this section apply throughout this chapter.

5       (1) To "photograph" means to make a print, negative, slide, digital  
6 image, motion picture, or videotape. A "photograph" means anything  
7 tangible or intangible produced by photographing.

8       (2) "Possession" and "possesses," in addition to their usual  
9 meanings, also mean intentionally viewing over the internet a visual  
10 depiction or a copy thereof of a depiction of a minor engaged in  
11 sexually explicit conduct. "Intentionally viewing" requires a pattern  
12 of viewing visual depictions of a minor engaged in sexually explicit  
13 conduct. For purposes of determining whether a person engaged in a  
14 pattern of conduct of intentionally viewing over the internet visual  
15 depictions or copies thereof of a minor engaged in sexually explicit  
16 conduct, the trier of fact shall consider the title, text, and content  
17 of the visual depiction, as well as the internet history, search terms,  
18 thumbnail images, downloading activity, expert computer forensic  
19 testimony, number of depictions of minors engaged in sexually explicit  
20 conduct, defendant's access to and control over the electronic device  
21 and its contents upon which the depictions were found, or any other  
22 relevant evidence.

23       (3) "Visual or printed matter" means (~~any~~) a photograph or other  
24 material that contains a reproduction of a photograph.

25       (~~(+3)~~) (4) "Sexually explicit conduct" means actual or simulated:

26       (a) Sexual intercourse, including genital-genital, oral-genital,  
27 anal-genital, or oral-anal, whether between persons of the same or  
28 opposite sex or between humans and animals;

29       (b) Penetration of the vagina or rectum by any object;

30       (c) Masturbation;

31       (d) Sadoomasochistic abuse for the purpose of sexual stimulation of  
32 the viewer;

33       (e) (~~Exhibition~~) Depiction of the genitals or unclothed pubic or  
34 rectal areas of any minor, or the unclothed breast of a female minor,  
35 for the purpose of sexual stimulation of the viewer. For purposes of  
36 this subsection (4)(e), it is not necessary that the minor know that he  
37 or she is participating in the described conduct, or any aspect of it;

1 (f) Defecation or urination for the purpose of sexual stimulation  
2 of the viewer; and

3 (g) Touching of a person's clothed or unclothed genitals, pubic  
4 area, buttocks, or breast area for the purpose of sexual stimulation of  
5 the viewer.

6 ((+4)) (5) "Minor" means any person under eighteen years of age.

7 ((+5)) (6) "Live performance" means any play, show, skit, dance,  
8 or other exhibition performed or presented to or before an audience of  
9 one or more, with or without consideration.

10 **Sec. 4.** RCW 9.68A.050 and 1989 c 32 s 3 are each amended to read  
11 as follows:

12 A person who:

13 (1) Knowingly develops, duplicates, publishes, prints,  
14 disseminates, exchanges, finances, attempts to finance, or sells  
15 ((any)) a visual or printed matter that depicts a minor engaged in an  
16 act of sexually explicit conduct; or

17 (2) Possesses with intent to develop, duplicate, publish, print,  
18 disseminate, exchange, or sell ((any)) a visual or printed matter that  
19 depicts a minor engaged in an act of sexually explicit conduct  
20 is guilty of a class C felony punishable under chapter 9A.20 RCW.

21 **Sec. 5.** RCW 9.68A.060 and 1989 c 32 s 4 are each amended to read  
22 as follows:

23 A person who knowingly sends or causes to be sent, or brings or  
24 causes to be brought, into this state for sale or distribution, ((any))  
25 a visual or printed matter that depicts a minor engaged in sexually  
26 explicit conduct is guilty of a class C felony punishable under chapter  
27 9A.20 RCW.

28 **Sec. 6.** RCW 9.68A.070 and 2006 c 139 s 3 are each amended to read  
29 as follows:

30 A person who knowingly possesses a visual or printed matter  
31 depicting a minor engaged in sexually explicit conduct is guilty of a  
32 class B felony.

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