STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1614

In the Matter of the Welfare of: J. E. M., Child

Filed April 23, 2012
Affirmed
Connolly, Judge
Concurring specially, Randall, Judge

Olmsted County District Court
File No. 55-JV-10-2459

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Karen A. Arthurs, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and Randall, Judge.*

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges his delinquency adjudication of possession of pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4(a) (2008). Appellant argues that the evidence was insufficient as a matter of law to prove that he

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

possessed child pornography "knowing or with reason to know its content and character," where the investigation could not establish how the pictures were initially obtained, whether appellant viewed the specific pictures, or whether any other actual child pornography was on the laptop. Appellant also argues that in determining whether appellant, who was 17-years-old at the time his laptop was seized, had reason to know that child pornography was on his laptop, the district court erred in using the reasonable person standard, which failed to take into account appellant's diminished culpability and immature mental state as a juvenile. Because there was sufficient evidence to support appellant's conviction and because appellant waived his argument about the proper standard to be applied by failing to raise it at the district court, we affirm.

FACTS

On December 29, 2008, Officer Dale Hanson of the Minneapolis Police Department conducted an undercover investigation into Internet child pornography using peer-to-peer networks—networks of computers set-up to share information and data. The network involved in this case, Gnuwatch, relies on software that allows sharing of files such as LimeWire and Shareaza. Officer Hanson found an IP address that indicated child pornography which corresponded to the street address for appellant, J.E.M.'s, father's home in Rochester, Minnesota. Gnuwatch continued to return to, and connect with, the host computer at this IP address about four times between 9:00 a.m. and 1:30 p.m. on December 29, 2008.

Officer Hanson created a video capture of the screen from his computer and prepared an investigation report reflecting his forensic analysis. He was able to

determine that the software the investigation had identified was Shareaza version 2.4 for peer-to-peer sharing and he was able to read the identification number for the client's software. Officer Hanson also found hash values that corresponded with hash values of known images of child pornography. Two images or files that are exactly the same will have the same hash values. In the course of his investigation, Officer Hanson found multiple images that he believed were child pornography. At trial, four of these images were offered as evidence and were also proven to be child pornography from a group called the "Vicki Series" through affidavits from a detective in the United Kingdom. The images were proved to be images of a nine-year-old girl who was being sexually abused by her father.

Upon further examination of the computer involved, Officer Hanson found it had four partitions on the hard drive, each running a different operating system. Two partitions, one using Windows VISTA, and a second using a Linux-based operating system called UBUNTU, required user passwords for access. The only user found for this computer was identified by the appellant's first name.

The Shareaza software where the child pornography was found was in the password-protected VISTA partition. Several files were found which had paths or names which indicated that they contained child pornography. The laptop was also found to have 5,250 thumbnail images in a folder called "thumbcache" located in the password-protected UBUNTU partition. Of these 5,250 images, approximately 54 were believed by Officer Hanson to contain child pornography. At trial, Officer Hanson explained that a thumbnail is a smaller or reduced image which can be displayed so that a viewer can

see many of them on a page at one time. The fact that a thumbnail is found on a computer does not necessarily mean that the user actually viewed the image, as the images may be saved even if they are located on an unviewed portion of the web page.

Officer Hanson found evidence that between 2:09 p.m. and 2:19 p.m. on December 29, 2008, files on the laptop containing child pornography had been accessed using encryption software called TrueCrypt—which allows one to change the extensions of the files so that one can hide the true nature of the file. Some of the files may have been deleted at that time as well, as the examination showed that the recycle bin or folder was accessed during that time. Officer Hanson found a file labeled ".recently-used.xbel.," located in the password-protected UBUNTU partition, which was a recently opened document list containing a number of child pornography files under the directory path "file:///media/truecrypt7/stuff/pt." Additionally, several e-mails that were sent to a personal e-mail address associated with appellant were reportedly received throughout the day on December 29, 2008.

At the time of the investigation, during late 2008 and early 2009, appellant was living with his mother, but also stayed with his father in Rochester, Minnesota on occasion. On December 25, 2008, appellant left for his father's home, bringing his laptop with him, and spent the remainder of his break from school there. Appellant had his laptop in his possession until sometime in late January or early February 2009, when his mother took the laptop away from him for disciplinary reasons. During this time, appellant's mother kept the laptop locked in her car, for which only she had keys, and covered it with a blanket. Appellant's mother did take the laptop to a friend on one

occasion, as she wanted to know what was on it. She was present while her friend looked at the laptop but she did not see anything on it while she was with him.

On March 10, 2009, Sergeant Anthony Teal of the Rochester Police Department obtained a search warrant based on Officer Hanson's report and executed it at appellant's father's home. Sergeant Teal searched the computers seized during the warranted search and did not find anything of evidentiary value. When appellant's mother learned that computers had been confiscated from appellant's father's home she had her fiancé deliver her son's laptop to the Rochester Police Department. Appellant's mother did not know the password to the computer or any of the programs on it, and denied ever using the computer. Appellant's father and his wife testified that they did not access or use the laptop, did not know the password for it, and did not set up Shareaza on it. Appellant's younger brother also stayed at his father's home during the same time period; however no evidence pointed to the younger brother as a potential suspect and there was never any suggestion he had access to appellant's computer.

Once Sergeant Teal had possession of the laptop and had a chance to review it, he learned that the VISTA partition required a login password and that the user profile for that partition carried appellant's first name. Sergeant Teal found the TrueCrypt program located on the computer, which contained some encrypted files, and found peer-to-peer software on the computer, which he identified as Shareaza or LimeWire.

Sergeant Teal next reviewed the laptop seeking deleted files, and found images that appeared to be child pornography. Because these files were in unallocated space, or had been deleted, they did not have identifying data on them, such as time information.

Among the images that Sergeant Teal found were the four from the "Vicki Series" that were verified to be child pornography.

Appellant was charged with one count of disseminating pornographic work in violation of Minn. Stat. § 617.247, subd. 3(a) (2008) and one count of possession of pornographic work on a computer or other electronic device in violation of Minn. Stat. § 617.247, subd. 4(a). Shortly after appellant was charged, the district court granted the state's motion to designate the proceeding as Extended Jurisdiction Juvenile (EJJ).

At trial, Richard Albee, a Certified Forensic Computer Examiner, testified for the defense. Albee, who had examined the hard drive from appellant's laptop and reviewed reports from police investigators, testified that while thumbnails may have dates on them, they do not tell you anything about the date on which the thumbnail may have actually been viewed. Albee did agree that the timeline of Officer Hanson's report was accurate and that child pornography was downloaded from appellant's laptop on December 29, 2008. He found no pornographic images in active folders but did find child pornography images in thumbnails or cache files. Albee agreed that there were file paths in the Shareaza folder or container and in the UBUNTU partition with file names suggesting child pornography. These files had date stamps of December 29, 2008, 2:19 p.m. Albee also agreed there was evidence of active use on the laptop on December 29, 2008 and that the Shareaza folder and recycle bin had been accessed on that date as well.

Albee testified that he found no evidence of repeated viewing of child pornography. When the laptop was turned over to Sergeant Teal, Shareaza did not contain any active files for sharing. Albee testified that files do not have to be put into a

download file by the user in order to allow them to be shared, but for a person to get child pornography on the computer from a peer-to-peer network, a query must be put in through Shareaza seeking child pornography.

Albee testified that although it appeared that the thumbnails containing child pornography referred to in Officer Hanson's report were from Internet viewing, he could not be sure as there was no path for them. The fact that some of the thumbnails in the thumbnail cache had last access dates of December 29, 2008 did not mean for certain that someone had looked at them on that date.

The state called Officer Dale Hanson, who had already testified as an expert witness at trial for the state, for brief rebuttal testimony. Officer Hanson testified that the only way a thumbnail could get from the Internet cache to the Thumbcache.db file is if the user accessed the Internet file and viewed the image. In the course of his investigation, he opened the Thumbcache.db file and saw a series of thumbnails which included files from the "Vicki Series." Officer Hanson agreed that if you open a file to view it in the "thumbnail view" then the thumbnails are going to be created whether you look at them or not and they will go to the Thumbcache.db file.

Following trial, appellant was found guilty of possession of pornographic work involving minors but was acquitted as to the dissemination charge. At a subsequent disposition hearing appellant was given a stayed adult sentence of 15 months in prison and was placed on EJJ probation until appellant turned 21-years-old. Pursuant to Minn. Stat. § 243.166, (2010) appellant must register as a predatory offender. Appellant challenges his conviction.

D E C I S I O N

Appellant raises two issues on appeal. First, he challenges the district court's determination that there was sufficient evidence to support his conviction of possession of pornographic work involving child pornography. In reviewing the sufficiency of the evidence, the court applies the same standard to both bench and jury trials. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. 2004). "[T]he reviewing court views the evidence in the light most favorable to the state and decides whether the fact-finder could have reasonably found the defendant guilty." *Id.* "When the evidence is circumstantial, it must form a complete chain that, viewed as a whole, leads so directly to the guilt of the defendant as to exclude any reasonable inference of doubt of guilt." *Id.* The district court's factual findings are upheld unless clearly erroneous. *Id.*

The district court found appellant guilty of possession of child pornography. To find a defendant guilty of possession of pornographic work involving minors, the state must prove beyond a reasonable doubt that the defendant "possess[ed] a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing pornographic work, knowing or with reason to know" the content and character of the work is pornographic work involving minors. Minn. Stat. § 617.247, subd. 4(a). "[A] possessor of child pornography has 'reason to know' that a pornographic work involves a minor where the possessor is subjectively aware of a 'substantial and unjustifiable risk' that the work involves a minor." *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007). "Proof of either

actual knowledge or reason to know that a pornographic work involves a minor may also be made by circumstantial evidence." *Id.*

Minnesota courts recognize that a fact-finder, such as a jury, "normally is in the best position to evaluate circumstantial evidence, and that their verdict is entitled to due deference." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Circumstantial evidence is entitled to the same weight as other evidence. *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). However, convictions based on circumstantial evidence merit stricter scrutiny. *Id.* "This heightened scrutiny requires us to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

Here, the circumstances formed a chain that led directly to appellant's guilt so as to exclude any reasonable inference other than guilt. The totality of the circumstances presented by the state led the fact-finder to reasonably infer that appellant "knew" or "had reason to know" that the pornographic work on his laptop involved a minor. Appellant argues that "without proof that appellant knowingly obtained the files, viewed the files or consciously failed to view the files under circumstances that a reasonable person would have had reason to know that the files were suspect," the standard of "knew" or "had reason to know" was not proved beyond a reasonable doubt.

Appellant points out that there were 54 suspected images of child pornography in a folder containing 5,250 thumbnails, making it unlikely appellant viewed each one of these images. Even though the files containing child pornography had been accessed and

moved, no evidence showed anyone doing so actually viewed the files or knew their content. Officer Hanson also established that someone having accessed a folder in a thumbnail view causes thumbnails to be created even if the computer user has never viewed the files. *See State v. Myrland*, 681 N.W.2d 415, 420 (Minn. App. 2004) ("[A] computer user could view legal adult pornographic materials at the top of a web page, and any illegal child pornographic material at the bottom of the page would be stored to the computer's hard drive, even if the user never 'scrolled down' or viewed the material and was unaware of its presence"), *review denied* (Minn. Aug. 25 2004).

Yet, circumstantial evidence presented at trial supports the state's theory that appellant was at least "subjectively aware of a 'substantial and unjustifiable risk' that the work involve[d] a minor." *Mauer*, 741 N.W.2d at 115. This included evidence that appellant was using his computer on December 29, 2008, at or around the time Officer Hanson downloaded the images of child pornography from appellant's laptop, that appellant likely accessed the folder where the images were found and manipulated those files in a way that they were no longer accessible, that at the time appellant accessed Shareaza through the password-protected VISTA partition the files still retained names tending to suggest the files contained images of child pornography,[1] and there was forensic evidence that 54 child pornography thumbnails were likely accessed shortly after the download, in gallery view or at least thumbnail view.

[1] At the time Officer Hanson downloaded the child pornography images on December 29, 2008, the file names on these images contained graphic terms such as "Childlover 7Yr Babyj.jpg," "Child Vibrator," "Kid-Nude-Teen-Trouble" and "14 Yr Illegal."

Even further, Officer Hanson testified about computer usage via the password protected UBUNTU partition, which demonstrated the computer user accessed the "truecrypt7" mounted drive, then a subfolder in the folder entitled "Shareza%Downloads," and then a return to the "truecrypt7" mounted device's "$RECYCLE.BIN." This occurred at 2:19 p.m. on December 29, 2008. Officer Hanson identified 52 child pornography thumbnails also in the UBUNTU partition with last access dates of December 29, 2008, at approximately 2:18 p.m. In the course of his investigation, Officer Hanson prepared four slides which demonstrate that the computer user likely viewed these child pornography images in gallery view or that they were at least brought up in thumbnail view. The district court found Officer Hanson to be a credible witness and afforded his testimony significant weight, as the court found him to be well-prepared and to have performed a complete examination on the computer involved. *See State v. Triplett*, 435 N.W.2d 38, 44 (Minn. 1989) ("Weighing the credibility of witnesses, including expert witnesses, is the exclusive function of the [fact-finder]").

Based on this evidence, it is reasonable to infer that appellant was accessing and manipulating these files, which undisputedly contained pornographic images involving a minor, and appellant therefore "knew" or "had reason to know" that the pornographic work on his laptop involved a minor.

Appellant also argues that because the state failed to prove how or when the illegal pornographic images were downloaded onto his laptop, or when or if these files were viewed by appellant, the state was required to prove that appellant had constructive

possession of the images by showing he had exercised dominion or control over them. In order to prove constructive possession the state needs to show (1) that the police found the contraband "in a place under defendant's exclusive control to which other people did not normally have access," or (2) "that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975).

Appellant cites to *Myrland*, in which this court held that the evidence failed to prove beyond a reasonable doubt that the defendant in fact possessed the illegal images or exercised exclusive control over the computers on which they were found. *Myrland*, 681 N.W.2d at 419. The present case, however, is factually distinguishable from *Myrland*, where the computers containing the pornographic images were located at a public school and the defendant "was one of potentially hundreds of people who could have accessed the computers in question . . . ." *Id.* at 420. Here the state presented evidence that the appellant was the owner of the laptop on which the child pornography was found, the IP address where the laptop was used on December 29, 2008 corresponded to the physical address of the appellant's father's home—where appellant was staying at the time, the only user profile on the computer was for appellant, at least two of the partitions on the laptop along with several software programs were password protected, and there was no evidence that anyone other than appellant had knowledge of these passwords.

Moreover, on December 29, 2008, when this password protected software had been accessed, contemporaneous e-mail activity via the Internet and Facebook to the

e-mail address associated with appellant had occurred, along with active manipulation of the contraband images. Further, while there was some testimony appellant lent his laptop to others on occasion, the evidence showed he was at his father's house with his laptop on December 29, 2008. This evidence creates a strong probability that appellant was consciously exercising dominion and control over the laptop on December 29, 2008. *See State v. Colsch*, 284 N.W.2d 839, 841 (1979) (finding that, even though defendant was not in actual or physical possession of the contraband at the time of the arrest, defendant constructively possessed contraband because there existed a strong probability that he was at the time consciously exercising dominion and control over it).

When viewed in a light most favorable to the conviction, the evidence presented by the state was sufficient for the fact-finder to reasonably infer beyond a reasonable doubt that appellant constructively possessed pornographic work with reason to know that the content and character of the work was pornographic work containing minors.

Next, appellant argues that in determining whether appellant, who was 17-years-old at the time his laptop was seized, had reason to know that child pornography was on his laptop the district court erred in using the reasonable person standard, and should have instead applied the "reasonable juvenile standard." Thus, appellant requests that if the case is not reversed and dismissed for insufficiency of the evidence this court reverse and remand for a new trial during which the proper legal standard is applied. *See State v. Wright*, 726 N.W.2d 464, 480 (Minn. 2007) (remanding case for further evidentiary hearings consistent with the Minnesota Supreme Court's ruling).

"[S]tatutory construction is a question of law, which we review de novo." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). "The object of all interpretation and construction of law is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). "We construe statutes to effect their essential purpose but will not disregard a statute's clear language to pursue the spirit of the law." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007).

Because appellant failed to raise the "reasonable juvenile standard" argument in district court, it is waived. Generally, an appellate court will not consider matters not argued to, and considered by, the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). "This is not, however, an ironclad rule." *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (quotation omitted); *see* Minn. R. Crim. P. 28.02, subd. 11 (stating that "[o]n appeal from a judgment, the court may review any order or ruling of the district court or any other matter, as the interests of justice may require"). We conclude that the interests of justice do not require us to consider this issue. In any event, appellant's argument fails.

Appellant cites to the United States Supreme Court's recently decided trio of cases regarding juvenile law to support his argument that a "reasonable juvenile standard" should have been applied, rather than the "reasonable person standard" in assessing whether or not appellant had reason to know that the child pornography was on his laptop. *See Roper v. Simmons*, 543 U.S. 551, 574-75, 125 S. Ct. 1183, 1198 (2005) (holding that juvenile offenders cannot be executed); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that juveniles who have not committed homicide cannot be

incarcerated for life); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (holding that age must be considered when determining the voluntariness of a confession).

This court has noted that courts most commonly utilize a reasonable juvenile standard in two particular criminal situations. *In re Welfare of A.A.M.*, 684 N.W.2d 925, 927 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). "First, in the context of custodial interrogations, courts have asked whether, given the circumstances, a reasonable juvenile would have believed that he was not at liberty to terminate an interrogation and leave." *Id.* "Second, courts have used a reasonable juvenile standard when determining whether a juvenile's conduct was criminally reckless or negligent." *Id.* However, there exists no caselaw or statutory authority in Minnesota to support appellant's proposition that a reasonable juvenile standard should apply to the element of knowledge in a possession of child pornography case. *See, e.g., In re Welfare of J.T.R.*, No. A08-1586, 2009 WL 1920372, at *2 (Minn. App. July 7, 2009) (declining to extend the law to approve the use of a reasonable juvenile standard in evaluating whether appellant knew the victim he sexually assaulted was mentally impaired).

Appellant argues that juveniles cannot help but engage in immature, impulsive behavior, especially in sexual matters, and that a juvenile would not likely recognize the implications of such pictures, the young age of the victim in such pictures, or that the pictures were real. Further, appellant argues that a juvenile would most likely be reckless and impulsive in downloading many files which remained of unknown content or origin. Here the issue was not of one of recklessness or negligence, but of knowledge and actual or constructive possession of child pornography. Additionally, there was no evidence

that appellant's possession of child pornography in this case was somehow linked to impulsive or immature behavior. Nor did appellant present any evidence that he accidently or innocently downloaded the illegal images while attempting to download legal ones. In fact, appellant was less than four months away from his 18th birthday when Officer Hanson downloaded the child pornography from his laptop on December 29, 2008, and there was evidence that he was at least of normal intelligence and was knowledgeable about computers.

In the absence of such evidence, this situation is not the type of circumstance where an exception to the waiver rule would be appropriate.

Affirmed.

RANDALL, Judge (concurring specially)

I concur in the result, meaning the delinquency adjudication, but the disposition imposed, which includes a ten-year registration requirement but basically imposes a lifetime "predatory offender" label, is so out of line on these facts that it begs a constitutional challenge on the grounds of "arbitrary and capricious, and cruel and unusual punishment."

The only way to fix this gross miscarriage of justice is to set aside the present predatory-offender-labeling statute, Minn. Stat. § 243.166, and replace it with a principle that has always been the underpinning of fair and proportionate sentencing (the goal of the Minnesota Sentencing Guidelines), namely, district court discretion. Except for murder in the first degree, which carries a mandatory life sentence, everything else in sentencing, right up to the most serious crimes, involves context. Meaning, the sentencing court has to look at what actually happened and use that in moving on to deciding whether the appropriate sentence is the presumptive sentence, an upward departure, or a downward departure, coupled with the various forms of what we call "stays" (e.g., stay of execution, stay of imposition, stay of adjudication, and "continuance for dismissal.").

The precedent is there to overturn the predatory-offender-registration statute as arbitrary and capricious, with an unconstitutional "cruel and inhumane aspect." Several years ago, a Minnesota district court judge threw out Minnesota's sentencing statute on crack cocaine, holding that it basically violated equal protection because the extreme

disparity between sentences for powdered cocaine and crack cocaine became an invidious discrimination against minorities. *State v. Russell,* 477 N.W.2d 886, 887 (Minn. 1991). The Minnesota Supreme Court upheld the overturning of that sentence, noting that the "challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection." *Id.* at 889.

The predatory-offender label is just one part of probation; when you earn your way off of probation, the label should go off. Your official juvenile/adult record will always have it there and law enforcement will be able to get at it if they have to, but, at least, if you deserve an expungement of that label after so many years, you will be able to get on with your life. And I am talking about expungement if the sentencing court finds that the label should now be dropped. Again, it will always be fact intensive. I suggest that if there is to be a minimum period of that label being part of probation, it should be no more than two or three years, rather than the "now-fashionable" ten, fifteen, or twenty year probationary sentences. By the end of a long probationary term, all the damage has been done. The ending of the predatory-offender label and its expungement from the person's record would never be mandatory at the end of a certain number of years. The offender would have to earn that right and the sentencing judge might say "your record isn't too bad, but there are some glitches, see you in three years and I'll reconsider." In other words, you have to give the district court some leeway to dump the label if the facts

and the person's life justify it, the same as you can work yourself off of any other probation.

The damage done by affixing that label—"predatory offender"—is monumental. That person will be severely hampered if not downright barred from, a number of life's occupations, including but not limited to, any type of civil service, state, or federal, law enforcement, whether city, county, state or federal, any job, no matter how menial, in the medical field where you might be in the vicinity of minors or vulnerable adults, the armed forces, the postal service, medical schools, law schools, occupations such as attorney, district court judge, appellate court judge, supreme court justice; even blue collar work will be a problem. A man or woman with the label "predatory offender" applies for an advertised job at a loading dock and passes the basic fitness and aptitude tests and now there are 10 qualified applicants for five openings. What does the foreman/boss say behind closed doors, "for __ sake, dump that assaulter, pedophile, sexual deviant, or whatever the hell he is!"

The facts of this case are what count. Appellant did not produce anything, did not procure anybody for the production, did not distribute anything, and had absolutely zero to do with the stream across the Internet. But it was on the Internet and available to him. The figures vary, but approximately 60% to 80% of worldwide computer Internet is pornography. If you cannot find it on your computer, you do not even know how to read your email. There is legal soft-core porn, legal hard-core porn, and illegal porn. *See* Minn. Stat. § 617.241, subd. 1(a) (2010) (defining "obscene" as "appeal[ing] to the

prurient interest in sex"); Minn. Stat. § 617.241, subd. 2(a) (2010) (making it unlawful to distribute obscene material); Minn. Stat. § 617.246, subd. 1(f)(1) (2010) (defining "pornographic work" as material depicting "a sexual performance involving a minor"). Minors are supposed to make it so terribly more offensive?! If you have scantily clad or naked 17-year-olds "doing time" in the "Caymans?" why is that so much more offensive than naked or partially clad 18-year-olds "doing time" in the "Caymans." If there is a hard-hitting word, it is that something is "offensive." But what is offensive?! You can ask 100 different people and, depending on their viewpoints, their background, their views toward organized religion, or the lack of it, their own particular lifestyle, and the lifestyle of their parents, their friends, their relatives, their children, the answers will vary all over the place.

As I said, all appellant did was look at dirty pictures that he had nothing to do with in their production or distribution, but they became available on his computer and he pulled them in. I would not be writing this concurrence if appellant was the producer or had any part of the procurement of those appearing in the video or in any way profited from the manufacture and sale. That is a whole different story, but that is not this story.

The bottom line is that the predatory-offender statute involving labeling for life for a wide ranging array of offenses, without district court judges being allowed to consider the context and the facts, is an unconstitutional denial of due process, and is so arbitrary and so capricious and so damaging that it is cruel and inhumane punishment as applied in this case. *See generally State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010) (holding

that, in "determining whether a punishment is cruel or unusual, [the court] look[s] to the "proportionality of the crime to the punishment assigned") (emphasis added); *cf. State v. Martin*, 773 N.W.2d 89, 99 (Minn. 2009) (holding that sentence of life imprisonment without possibility of release for first-degree murder committed while a juvenile was not cruel and unusual punishment).

I concur in the result, but write separately about part of this punishment.