IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MEYERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34998

FILED

NOV 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of distributing materials depicting pornography involving minors and one count of possession of visual presentation depicting sexual conduct of persons under sixteen years of age. The district court sentenced appellant to consecutive prison terms totaling four to fifteen years. Appellant, David Meyers, challenges the constitutionality of NRS 200.725, which prohibits the distribution of child pornography, and NRS 200.730, which prohibits the possession of child pornography. Meyers was charged with possessing and distributing child pornography on the Internet. Meyers alleges that these statutes are unconstitutionally overbroad and vague; and that they violate the Commerce and Supremacy Clauses of the United States Constitution. Meyers also alleges that the district court abused its discretion in sentencing him and that his sentence constitutes cruel and/or unusual punishment. We disagree.

Meyers argues that Nevada's child pornography statutes are unconstitutionally overbroad on their face because they criminalize materials with virtual children, which he claims are products of the mind that are protected by the First Amendment. Because Meyers does not claim that the pornographic pictures he possessed and distributed were of virtual children, nor does he provide any evidence to support that contention, we conclude that this is a hypothetical argument and decline to consider it. This court does not provide answers to hypothetical questions.[1]

[1]Spilotro v. State ex rel. Gaming Comm'n, 99 Nev. 187, 196, 661 P.2d 467, 472 (1983) (Gunderson, J. and Schouweiler, D.J., concurring).

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Meyers also contends that the terms "lewd" and "distribute" in NRS 200.725 and NRS 200.730 are unconstitutionally vague because a person of average intelligence would not know what they proscribe. We disagree. A statute is void for vagueness only if it fails to give fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden.[2] However, the statutory language need not convey more than a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.[3]

NRS 200.725 and NRS 200.730 prohibit the distribution and possession of materials that depict minors involved in "sexual conduct." Sexual conduct is defined to include "lewd exhibition of the genitals."[4] While the word "lewd," by itself, may be vague, we conclude that the phrase, "lewd exhibition of the genitals," is not.[5] Likewise, the term "distribute" in NRS 200.725 is not vague. Meyers argues that the term does not expressly include computer transmission of child pornography and is therefore vague as to its application in this case. We disagree. The term "distribute" is unmodified in the statute and includes all forms of distribution, including Internet transmission.[6]

Meyers further argues that the district court abused its discretion and violated state and federal proscriptions against cruel and/or unusual punishment when it sentenced him to up to fifteen years

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[2]Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175, 177 (1998); Williams v. State, 110 Nev. 1182, 1186-87, 885 P.2d 536, 539 (1994); see also Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[3]Williams, 110 Nev. at 1186-87, 885 P.2d at 539.

[4]NRS 200.700(3).

[5]Several state courts have upheld statutes proscribing "lewd exhibition of genitals" as constitutional. See, e.g., Bloom v. Municipal Court for Inglewood J.D., etc., 545 P.2d 229, 235 (Cal. 1976); State ex rel. Cahalan v. Diversified Theat., 229 N.W.2d 389, 394 (Mich. Ct. App. 1975), rev'd on other grounds by, 240 N.W.2d 460 (Mich. 1976); State v. Fan, 445 N.W.2d 243, 246 (Minn. Ct. App. 1989); People v. Capitello, 528 N.Y.S.2d 263, 269 (Suffolk County Ct. 1988); State v. Bibbs, Nos. 53803, 54894, 1988 WL 86301, at *3 (Ohio Ct. App. June 23, 1988); Garay v. State, 954 S.W.2d 59, 63 (Tex. Crim. App. 1997).

[6]See State v. Brady, 753 A.2d 1175, 1177-79 (N.J. Super. Ct. App. Div. 2000), cert. denied, 762 A.2d 220 (N.J. 2000) (interpreting a New Jersey statute similar to the one at issue here).

imprisonment for his first conviction of any kind. We disagree. The trial court has wide discretion in sentencing,[7] and an abuse of that discretion will only be found if the record demonstrates prejudice on the part of the district court.[8] Because there is no evidence of prejudice in the record, we find that the trial court did not abuse its discretion in sentencing Meyers. Furthermore, Meyers sentence is well within the limits proscribed by NRS 200.725 and NRS 200.730 and is, therefore, not unconstitutionally cruel and/or unusual.[9] Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[10]

Meyers argues that the Nevada statutes are unconstitutional because by regulating the Internet they violate the Commerce Clause. Meyers has cited no legal authority for this contention so we decline to consider it.[11]

Finally, Meyers argues that Congress, with its passage of the federal Child Pornography Prevention Act of 1996, has preempted the field. We conclude that regulation of child pornography lies within the state's police powers because it implicates the health, safety and welfare of the state's citizens.[12] In areas of traditional state regulation, the court must assume that historic police powers are not to be superseded by federal law unless that was the clear and manifest purpose of Congress.[13]

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[7]Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1258 (1994).

[8]Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978).

[9]Epp v. State, 107 Nev. 510, 515, 814 P.2d 1011, 1015 (1991).

[10]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[11]We have held that we need not consider an argument unsupported by citations to legal authority. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[12]State v. District Court, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985).

[13]New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

There has been no manifestation of such purpose here. Therefore, we conclude that the regulation of child pornography has not been preempted by the federal government.

Having reviewed Meyers' contentions and concluded that they lack merit, we

ORDER the district court's decision AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Michael R. Griffin, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk