IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. JESSE LEE McCOLLAUGH, Defendant–Appellant.	S. CT. NO. 23–0600

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE JAMES B. MALLOY, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant Jesse Lee McCollaugh to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about December 12, 2023. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

There is insufficient evidence to sustain McCollaugh's conviction for sexual exploitation of a minor because R.A. did not engage in nudity for the purposes of arousing or satisfying the sexual desires of a person who may view the video clips of her.

Iowa Code section 728.12 addresses the sexual exploitation of minors. It provides:

> 1. It shall be unlawful to employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor or a law enforcement officer or agent posing as a minor to engage in a prohibited sexual act or in the simulation of a prohibited sexual act. A person must know, or have reason to know, or intend that the act or

> simulated act may be photographed, filmed, or otherwise preserved in a visual depiction. . . .
>
> 2. It shall be unlawful to knowingly promote any material visually depicting a live performance of a minor engaging in a prohibited sexual act or in the simulation of a prohibited sexual act. . . .
>
> 3. It shall be unlawful to knowingly purchase or possess a visual depiction of a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act. A visual depiction containing pictorial representations of different minors shall be prosecuted and punished as separate offenses for each pictorial representation of a different minor in the visual depiction. However, violations of this subsection involving multiple visual depictions of the same minor shall be prosecuted and punished as one offense. . . .
>
> . . .

Iowa Code § 728.12 (2022). McCollaugh was convicted of a violation of subsection 3—knowingly possessing a visual depiction of a minor engaging in a prohibited sexual act. (Verdict) (App. p. 20).

As outlined in the opening brief, this case involves interpretation of the statutory language. When the Court must determine the meaning of the language at issue, it takes "into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes." *Doe*

v. State, 943 N.W.2d 608, 610 (Iowa 2020) (citation omitted). All three of the subsections of section 728.12 require that the minor *engage* in a prohibited sexual act for the purposes. *See* Iowa Code § 728.12 Additionally, a "prohibited sexual act" is defined by a related statute and includes "*[n]udity of a minor for the purpose* of arousing or satisfying of the sexual desires of a person who may view a visual depiction of the nude minor." Iowa Code § 728.1(7) (2022).

Although the State asserts that Iowa cases reviewing convictions of section 728.1(7)(g) have never required to prove the victim's purpose in being nude, it does not appear that any Iowa Court has ever directly considered the argument and the interpretation of this statutory language. (State's Br. p. 13–17). The appellate court reviews the issues "within the legal framework presented by the parties." *See State v. Boldon*, 954 N.W.2d 62, 69–70 (Iowa 2021). The Iowa cases cited by the State do not examine the victim's purpose; however, doing so would be inappropriate if the defendant did not challenge that the statutory language required such. *See, e.g.*, *State v.*

Gaskins, 866 N.W.2d 1, 42 (Iowa 2015) (Waterman, J., dissenting) (citations omitted) (noting judges should remain an impartial and neutral decision maker and not assume the role of an advocate); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("[W]e will not speculate on the arguments Autorama might have made and then search for legal authority and comb the record for facts to support such arguments.").

For example, in *State v. Rees*, the defendant argued there was insufficient evidence of an intent to satisfy, arouse, or gratify sexual desires. *See State v. Rees*, No. 14–1124, 2015 WL 3876740 (Iowa Ct. App. June 24, 2015) (unpublished table decision). However, the defendant's entire argument revolved around the lack of evidence of *his own intent*. *See Brief for Defendant–Appellant*, *State v. Rees*, 2015 WL 3876740 (Iowa Ct. App. June 24, 2015) (No. 14–1124), 2015 WL 13922906, at *39 (noting there was no evidence the defendant viewed the recording, the defendant did not delete the recording, and cooperated with the police, including providing them with the recording, which he argued "did not suggest a guilty

conscious"). Likewise, the State responded that "Rees's outward acts showed this intent." *See Brief for State–Appellee*, *State v. Rees*, 2015 WL 3876740 (Iowa Ct. App. June 24, 2015) (No. 14–1124), 2015 WL 13922905, at *18–19. Thus, the defendant never presented the question that McCollaugh does now—whose intent the statutory language implicates. The same appears true in the *Anderson* case, by the Court's discussion in the opinion. *See State v. Anderson*, No. 10–0787, 2011 WL 1376731 (Iowa Ct. App. Apr. 13, 2011) (unpublished table decision). The appellate courts thus discussed the defendants' intent, as this was the framework presented by the parties in the appeal. *See Boldon*, 954 N.W.2d at 69–70.

Similarly, the defendant in *State v. Hunter* did not raise a sufficiency challenge, but rather argued the "for the purposes of arousing or satisfying the sexual desires of a person who may view a depiction of the nude minor" was unconstitutionally vague as applied to him. *See State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996). In rejecting the vagueness challenge, the Court noted:

> Hunter can hardly claim one in his position would think his conduct innocent when he took the photographs late at night, in a motel room, dressed only in his underwear and with an erection. Whatever ambiguity may arguably exist at the edges of this statute, *Hunter had fair warning his action in photographing his partially-clothed daughter in provocative poses fell within the act.*

Id. at 466. Thus, the Court did not squarely determine the issue presented in this case; it was only considered whether the challenged language was so vague "so as to alert him his conduct was prohibited"—a claim it rejected when considering the circumstances surrounding his actions. *See id.* 465–66. Additionally, it did consider the potential purpose of the victim, noting she posed provocatively for the photographs. *See id.* at 466.

The appellate courts in *Hunter*, *Rees*, and *Anderson* did not address or directly consider the issue of statutory interpretation now raised by McCollaugh regarding the meaning of "for the purposes of arousing or satisfying the sexual desires." Thus, these cases hold no precedential value on this point. Nor do they provide any support for

the State's interpretation of this statutory language because the issue was not raised or discussed by the parties, and thus, it was not considered by the appellate court. *See Boldon*, 954 N.W.2d at 69–70.

Additionally, even assuming arguendo the State is correct the victim's purpose is immaterial, the evidence is still insufficient to support McCollaugh's conviction. The State's interpretation ignores the statutory language requiring the minor "engage" in the prohibited sexual activity. "[C]ourts are not free to ignore the statutory language in favor of what the statute 'should' provide." *See Patton v. Mun. Fire & Police Ret. Sys. of Iowa*, 587 N.W.2d 480, 482 (Iowa 1998) (citation omitted).

In *State v. Romer*, the Iowa Supreme Court examined whether the defendant had committed a crime by engaging in a "pattern of practice or scheme of conduct to engage in any of the [prohibited] conduct" found in the statute. *See State v. Romer*, 832 N.W.2d 169, 175–76, 178 (Iowa 2013) (citing Iowa Code § 709.15(3) (2009)) (internal quotation marks omitted). In

examining the word engaged as used in the statute, the Court looked at the word's ordinary definition and common usage. *See Romer*, 832 N.W.2d at 179 (citation omitted). The Court stated: "The dictionary has multiple definitions for the word 'engage.' The one most applicable defines 'engage' as 'to employ or involve oneself.'" *Id.* (citation omitted). The *Romer* Court also noted that in interpreting statutory language that is not defined by the legislature, it is appropriate to "refer to prior decisions of this court." *Id.*

To sustain a conviction for sexual exploitation of a minor under Iowa Code section 728.12, the State had to prove McCollaugh possessed "a visual depiction of *a minor engaging* in a prohibited sexual act." *See* Iowa Code § 728.12 (emphasis added). Thus, under the Supreme Court's interpretation of engage in *Romer*, the minor in this case, R.A., had to be employing or involving herself in the sexual act. *See Romer*, 832 N.W.2d at 179. A different dictionary than the one the Supreme Court relied upon in *Romer* explains the word engage as: "If you engage in an activity, you do it or *are actively*

involved with it." *See Engage*, Collins Dictionary https://www.collinsdictionary.com/us/dictionary/english/engage (last visited Jan. 13, 2024) (emphasis added).

Applying these definitions to the statute at hand, the statutory language requires that the minor *engage or be actively involved* in the prohibited sexual act. To be actively involved necessarily requires some knowledge and knowing, active participation by the minor. *Compare State v. Liebau*, 67 P.3d 156, 159 (Kan. Ct. App. 2003) ("While we can assume under the facts of this case that Liebau made and possessed the videotapes with the intent to arouse or satisfy his sexual desires or appeal to his prurient interest, the nudity depicted on the videotape is that of a child in a 'harmless moment.' Clearly, a 16–year–old girl, unaware that she is being videotaped in the nude while using the bathroom, cannot be said to be engaging in sexually explicit conduct or an exhibition of nudity."), *with State v. Coburn*, 87 P.3d 348, 355 (Kan. Ct. App. 2004) (finding sufficient evidence supporting the defendant's conviction for sexual exploitation of a child

when the photographs constituted "more than mere nudity" because the photos "did not depict models who were 'unaware' of the camera, but rather were clearly posing for the camera"); *see also People v. Linares*, No. B281309, 2018 WL 6273833, at *5–7 (Cal. Ct. App. Nov. 29, 2018) (unpublished decision) (finding insufficient evidence the minor engaged in sexual conduct when the defendant videotaped her without her knowledge disrobing before a shower in the bathroom, where the "principal use is for nonsexual activity such as using the toilet, bathing, and showering"). Notably, the Utah statutory language cited in the State's brief lacks the language requiring the minor engage in the sexual act. *See, e.g.*, *State v. Morrison*, 31 P.3d 547 (Utah 2001) ("[S]ection 76–5a–3(1) makes a person guilty of sexual exploitation of a minor 'when he knowingly . . . possesses material . . . depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person.'").

The statutory language of section 728.12(3) requires the State establish R.A. *actively involved or engaged* in the

prohibited sexual act. As R.A. did not know she was being videotaped, the State failed to present evidence of this requirement. (Mins. Test. p. 17) (Conf. App. p. 20). Accordingly, this Court should reverse his conviction for sexual exploitation of a minor and remand to the district court for dismissal of these charges. *See State v. Schiebout*, 944 N.W.2d 666, 671–72 (Iowa 2020) (citations omitted).

Moreover, there is an Iowa statute that clearly criminalizes the surreptitious viewing, videotaping, or photographing of unknowing nude or partially nude individuals or those who are unable to consent, such as babies or small children. Iowa Code section 709.21 prohibits a person from knowingly "view[ing], photograph[ing], or film[ing] another person, for the purpose of arousing or gratifying the sexual desire of any person." *See* Iowa Code § 709.21(1) (2022). That the defendant's actions may be criminal does not mean that his actions are prohibited by the statutory language at issue. *See, e.g.*, *Schiebout*, 944 N.W.2d at 672 (acknowledging that the defendant's conduct might fall under

other code sections but determining the statutory language did not prohibit her actions); *State v. Nall*, 894 N.W.2d 514, 524–25 (Iowa 2017) (vacating the defendant's convictions for insufficient evidence, despite the evidence being sufficient to establish other forms of theft).

Furthermore, the State's interpretation of the statute is too broad. Under its interpretation, an innocent photo of a nude or partially nude minor would transform into "child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See United States v. Villard*, 885 F.2d 117, 125 (3rd Cir. 1989) (citations omitted). For example, a parent taking an innocent photograph of their naked child in a bathtub could be arrested for the photograph—either taking it, possessing it, or posting it on social media—under the State's interpretation of section 728.12, should the photograph get in the hands of the wrong person. *See* Derek Hawkins, *How an Arizona couple's innocent bath time photos of their kids set off a 10-year legal saga*, The Denver Post, (Jan 24, 2018 6:50 p.m.),

https://www.denverpost.com/2018/01/24/arizona-bath-time-photos-child-protective-services/. Such an interpretation is not only at odds with the protections of the First Amendment, but it also raises concerns of vagueness and overbreadth. As such, the Court should decline to adopt the State's interpretation of the statutory language. *See Simmons v. State Pub. Def.*, 791 N.W.2d 69, 74 (Iowa 2010) (citations omitted) ("While we often decide cases on statutory grounds to avoid constitutional infirmities, a corollary of this rule is the notion that our interpretation of statutes is often powered by our desire to avoid the constitutional problem. If fairly possible, a statute will be construed to avoid doubt as to constitutionality.").

As discussed above, the statutory language requires the minor *engage* in a prohibited sexual act. Additionally, the language requires the victim engage in the nudity for the purpose of the viewer's sexual gratification. As outlined in the opening brief, the State did not present evidence of either.

Thus, the evidence is insufficient, and dismissal is required. *See Schiebout*, 944 N.W.2d at 671–72.

CONCLUSION

For the reasons stated above and in the opening brief, Defendant–Appellant Jesse Lee McCollaugh respectfully requests the Court reverse his conviction for sexual exploitation of a minor and remand to the district court for dismissal of the charge. Alternatively, he asks the Court to vacate his sentence and remand to the district court for resentencing in front of a different judge.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $0, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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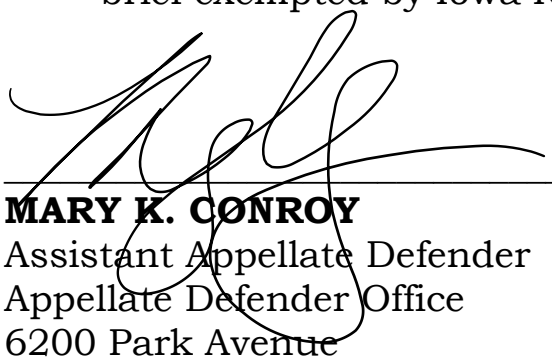

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