

Virginia State Crime Commission

Sexting

2009

SEXTING

The Crime Commission received a letter from the Virginia Joint Commission on Technology and Science requesting that a study be conducted on the general topic of “sexting.” This request was approved by the Executive Committee, and staff was directed to additionally concentrate on the sex offender registry requirements under state and federal law for any juveniles convicted under any of Virginia’s current criminal statutes.

“Sexting” is a recently invented term that refers to the act of taking a sexually suggestive digital photo of oneself, or arranging for a friend to take such a photo, and then transmitting it electronically, usually via a text picture message sent from one cellular phone to another. The word itself is a derivation from the slightly older word “texting,” which refers to the sending of text messages from one cellular phone to another. Sexting has increasingly attracted nationwide attention, as many of the participants taking and receiving such photos are considered juveniles. One recent study found that 22% of teenage girls, and 18% of teenage boys, have sent or posted images or video showing themselves nude or semi-nude. More troubling, the study reported that 11% of young teenage girls, between the ages of 13 and 16, had done so.

When juveniles engage in sexting, the nude or sexually suggestive photos involved may meet the legal definition of child pornography. Thus, juveniles who create, send, duplicate, or simply possess such images may have violated child pornography laws, even if unintentionally, and may incur severe repercussions, such as being placed on a sex offender registry. Sexting has therefore raised general policy debates across the country. Child pornography laws were enacted to criminalize the predatory behavior of older adults who victimize children, and the products of their illegal activities. Are they appropriate for teenagers who have engaged in sexting voluntarily? Should juveniles, who erroneously thought these photos were simply the equivalent of flirtatious love notes, be subject to the criminal justice system? What is the best way to curtail this behavior by juveniles, and educate them as to the long-term embarrassment or other, even more harmful repercussions that may arise from taking and then transmitting pornographic photos of themselves?

CRIMINAL STATUTES UNDER VIRGINIA LAW

The act of sexting may violate or lead to a violation of a number of Virginia’s laws that criminalize various actions related to the production, possession, transmission, or solicitation for child pornography. The photo or image must meet the legal definition of “child pornography,” which is defined as “sexually explicit visual material which utilizes or has as a subject an identifiable minor.” “Sexually explicit visual material” is defined, in turn, as:

“a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation.”

The definition of “nudity” provided by Virginia Code § 18.2-390 is:

“a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.”

Therefore, it is possible under Virginia law for a photo of a minor who is not naked, but is wearing revealing lingerie, to qualify as child pornography. It is also possible, however, that a photo of a completely naked minor would not qualify as child pornography, even if the genitals were fully visible, provided the genitals were not the main focus of the photo, and the minor was not positioned in a “lewd” posture.

If a photo does meet the definition of child pornography, the production of it is a felony under Virginia Code § 18.2-374.1(B)(2); the language of the statute does not exempt a person who makes such a photo of himself or herself. The penalty depends upon the age of the subject of the photo: if the minor is under the age of 15 years, it is an unclassified felony carrying from 5 to 30 years; if the minor is 15 years old or older, it

is an unclassified felony carrying from 1 to 20 years.

The act of sexting the photo would constitute a separate crime, distribution of child pornography, which is a felony under Virginia Code § 18.2-374.1:1. The punishment is from 5 to 20 years incarceration; a second offense is also punishable by 5 to 20 years, but carries a mandatory minimum 5 years, no part of which can be suspended. The person who receives the sexted photo would be guilty of possession of child pornography, which is a Class 6 felony for a first violation, and Class 5 felony for a second or subsequent violation. (A Class 6 felony carries from 1 to 5 years incarceration; a Class 5 felony carries from 1 to 10 years incarceration). If two or more photos are sexted, even at the same time, the recipient would be guilty of a separate offense for each photo he possessed, and at least one “second or subsequent offense” would be applicable. Similarly, the person sending the photos would be guilty of multiple offenses as well.

If the recipient of the sexted photos displays them “with lascivious intent” to a friend, that would constitute yet another violation of Virginia Code § 18.2-374.1:1, carrying the same penalty as transmission, or re-transmission, of the images: 5 to 20 years for a first offense, and for a second offense, 5 to 20 years, with a mandatory minimum of 5 years. Considering how easy it is to forward electronic photos to multiple people all at once, it becomes apparent that a single illegal photo that is shared could rapidly lead to dozens or even hundreds of people being guilty of one of the above mentioned felonies.

Two additional crimes could be involved in some sexting scenarios. It is a felony to solicit a minor to appear in child pornography; the penalty is the same as for producing child pornography. Therefore, if a teenager asks his underage girlfriend to send him a nude photo, he would be guilty of a crime, even if the girlfriend refused and no photo was sexted. If this solicitation occurred by e-mail or by texting, that would be an additional felony, as it is a separate crime to solicit child pornography through an electronic communications system or over the phone. If the defendant is eighteen years of age or older, it is a Class 5 felony; if he is a minor, it is a Class 6 felony.

It should be pointed out that in most cases, juveniles found guilty of any of these

crimes would not receive the lengthy sentences specified in the criminal statutes. Juveniles are generally tried in Juvenile and Domestic Relations district courts, and if “adjudicated delinquent,” usually receive a disposition far different than what an adult would receive. Typically, juveniles do not receive punishments that involve extensive periods of incarceration, as the philosophy and spirit of the juvenile justice system is to focus on rehabilitation whenever possible. Even in extreme cases, juveniles may not be incarcerated past their 21st birthday. However, any teenagers who are adults at the time of an offense that involves sexting would be tried and sentenced as adults, and could receive lengthy prison sentences. Also, a juvenile who is transferred and tried as an adult, pursuant to Virginia Code § 16.1-269.1, can be sentenced as an adult, and could receive a similarly lengthy prison sentence.

REGISTRATION REQUIREMENTS UNDER VIRGINIA LAW

Under Virginia law, adults who are convicted of any offense involving child pornography must register with Virginia’s Sex Offender and Crimes Against Minors Registry. However, juveniles, are not subject to mandatory registration if they are found delinquent of a sex offense, including those that involve child pornography. They are only required to register if they are over the age of 13 at the time of the offense, the offense was one which requires registration if committed by an adult, the prosecutor makes a motion for the juvenile to be registered, and the court finds that the circumstances of the crime require registration. Factors the court is to consider in making this determination are:

(i) the degree to which the delinquent act was committed with the use of force, threat or intimidation, (ii) the age and maturity of the complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the complaining witness and the offender, (v) the nature of the relationship between the complaining witness and the offender, (vi) the offender’s prior criminal history, and (vii) any other aggravating or mitigating factors relevant to the case.

Therefore, most juveniles who currently commit a sexting offense in Virginia would probably not be required to register as sex

offenders, even if tried and convicted. Teenagers who are adults at the time of the offense would have to register, though, as would juveniles who are tried as adults; registration for these defendants is automatically required upon conviction

REGISTRATION REQUIREMENTS UNDER FEDERAL LAW

The federal Sex Offender Registration and Notification Act (“SORNA”) is the first part of the more comprehensive Adam Walsh Act. SORNA requires all states to create sex offender registries, or risk reductions in the amount of Byrne funding they receive. SORNA contains many specific requirements as to which offenses must result in registration after a conviction, and how long different offenders must remain on the registry. Under SORNA, juveniles who are adjudicated delinquent of a sex offense must be placed on their state’s registry, but only if they were 14 years of age or older at the time of the offense, and the offense was “comparable to or more severe than aggravated sexual abuse,” or was an attempt or conspiracy to commit such a crime. “Aggravated sexual abuse” involves physical contact with the victim, either carried out against the victim’s will, or involving a child under the age of 12. Therefore, SORNA does not require that a state place juvenile offenders on its sex offender registry for sexting type offenses, although a state may choose to do so. In this regard, Virginia is not out of compliance with SORNA.

SORNA does require that adults convicted of offenses involving child pornography be placed on a sex offender registry: production and distribution of child pornography require registration for at least 25 years, while possession of child pornography requires registration for at least 15 years. Juveniles who are convicted as adults are also subject to these registration requirements. Virginia’s registration requirements for any sexting offenses committed by adults, or juveniles convicted as adults, at the present time meet or exceed the SORNA requirements.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the topic of sexting. Discussion was held as to whether or not a separate criminal statute should be created

specifically for the crime of sexting. The general consensus was that Virginia’s criminal laws are currently sufficient to handle the egregious cases, and for less severe cases, prosecutors are free to use their discretion by either declining to prosecute the matter and instead arranging for a Child in Need of Services (CHINS) petition to be filed, or, alternatively placing the defendant on a probationary period with a deferred disposition. As the criminal justice system seems at this time to be able to adequately address the problem from that perspective, sexting should be seen more as an issue of safety and awareness. Therefore, the Crime Commission recommended that a letter be sent to the Virginia Board of Education, informing them on the results of the study and requesting them to inform/educate students, parents, and teachers on the dangers and illegality of sexting. The Virginia Department of Education was already working on this issue and sent a letter to the members of the Crime Commission detailing their work.